

77 Am. Jur. 2d Veterans and Veterans Laws IX Refs.

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Veterans and Veterans' Laws

Karl Oakes, J.D.

IX. Home, Farm, and Business Loans

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Research References

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  108.1 to 112

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West's A.L.R. Digest, [Armed Services](#)  108.1 to 112

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IX. Home, Farm, and Business Loans

§ 127. Home, farm, and business loans, generally

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Federal statutes specifically make provision with regard to housing and small business loans to veterans.¹ Such provisions authorize the guarantee of a statutorily specified portion of loans made for specified purposes to veterans² and place certain restrictions on such loans.³ Loans guaranteed or insured under the applicable statutes⁴ are payable upon such terms and conditions as may be agreed upon by the parties thereto, subject to the applicable statutes and the regulations of the Secretary issued pursuant to such statutes, and will bear interest not in excess of such rate as the Secretary may from time to time find the loan market demands except that in establishing the rate of interest that is applicable to such loans, the Secretary must consult with the Secretary of Housing and Urban Development regarding the rate of interest applicable to home loans insured under a specified provision of the National Housing Act.⁵

Practice Tip:

Any evidence of guaranty or insurance issued by the Secretary is conclusive evidence of the eligibility of the loan for guaranty or insurance under the federal statutory provisions pertaining to home and small business loans to veterans⁶ and of the amount of such guaranty or insurance.⁷

No officer, employee, department, or agency of the United States may set off against, or otherwise withhold from, any veteran or the surviving spouse of any veteran any payments (other than benefit payments under any law administered by the Department of Veterans Affairs) which such veteran or surviving spouse would otherwise be entitled to receive because of any liability to the Secretary allegedly arising out of any loan made to, assumed by, or guaranteed or insured on account of such veteran or surviving spouse under the statutes pertaining to home and small business loans to veterans⁸ unless the Secretary provides such veteran or surviving spouse with notice by certified mail of the authority of the Secretary to waive the payment of indebtedness.⁹

Statutes also govern appraisers and appraisals of property for purposes of the provisions for home and small business loans to veterans.¹⁰

Provision is made by statute for the charging of interest and administrative costs, under regulations which the Secretary of Veterans Affairs prescribes, to the extent not precluded by the terms of the loan instruments concerned, for an indebtedness resulting from a person's participation in a program of loans, loan guaranties, or loan insurance administered by the Secretary.¹¹

Observation:

Veterans home or small business loans guaranteed or insured are exempt from state antiusury provisions under certain circumstances.¹²

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Footnotes

- 1 38 U.S.C.A. §§ 3701 to 3765.
- 2 Federal regulations regarding loan guaranties to veterans may be found at 38 C.F.R. §§ 36.4201 to 36.4709.
- 3 38 U.S.C.A. § 3703(a)(1).
- 4 38 U.S.C.A. § 3704.
- 5 38 U.S.C.A. §§ 3701 to 3765.
- 6 38 U.S.C.A. § 3703(c)(1) (referring to provision of 12 U.S.C.A. § 1709(b), pertaining to insurance of mortgages).
- 7 38 U.S.C.A. §§ 3701 to 3765.
- 8 38 U.S.C.A. § 3721.
- 9 38 U.S.C.A. §§ 3701 to 3765.
- 10 38 U.S.C.A. § 3726(a).
- 11 38 U.S.C.A. § 3731.
- 12 38 U.S.C.A. § 5315(a)(3), (b).
- 13 38 U.S.C.A. § 3728.

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IX. Home, Farm, and Business Loans

§ 128. Lenders; guarantees of loans by particular lenders

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West's Key Number Digest

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Housing loans to veterans will be automatically guaranteed only if made by a federal land bank, national bank, state bank, private bank, building and loan association, insurance company, credit union, or mortgage and loan company that is subject to examination and supervision by an agency of the United States or of any state,¹ or by any state,² or by any lender approved by the Secretary of Veterans Affairs pursuant to standards established by the Secretary.³ Any housing loan proposed to be made to a veteran by any lender not of a class so specified may be guaranteed by the Secretary if he or she finds that it is in accord otherwise with the provisions of the applicable statutes.⁴

The Secretary may at any time upon 30-days notice require housing loans to be made by any lender or class of lenders to be submitted to the Secretary for prior approval.⁵ Any housing loan at least 20% of which is guaranteed may be made by any national bank or federal savings and loan association, or by any bank, trust company, building and loan association, or insurance company, organized or authorized to do business in the District of Columbia. Any such loan may be so made without regard to the limitations and restrictions of any other law relating to statutorily specified matters.⁶

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Footnotes

- 1 [38 U.S.C.A. § 3702\(d\)\(1\).](#)
- 2 [38 U.S.C.A. § 3702\(d\)\(2\).](#)
- 3 [38 U.S.C.A. § 3702\(d\)\(2\).](#)
- 4 [38 U.S.C.A. § 3702\(d\).](#)
- 5 [38 U.S.C.A. § 3702\(e\).](#)
- 6 [38 U.S.C.A. § 3702\(f\).](#)

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§ 129. Home and residential loans

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West's Key Number Digest

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In recognition of the debt owed the men and women who have served in our country's armed forces in time of conflict, the Department of Veterans Affairs offers them home loan guarantees or terms substantially more favorable than those prevailing in the market.¹ With statutorily specified exceptions,² any loan to a veteran, if made pursuant to the provisions of the federal statutes pertaining to home and small business loans to veterans,³ is automatically guaranteed if such loan is for one or more of the following purposes—

- to purchase or construct a dwelling to be owned and occupied by the veteran as a home.⁴
- to purchase a farm on which there is a farm residence to be owned and occupied by the veteran as the veteran's home.⁵
- to construct on land owned by the veteran a farm residence to be occupied by the veteran as the veteran's home.⁶
- to repair, alter, or improve a farm residence or other dwelling owned by the veteran and occupied by the veteran as the veteran's home.⁷
- to refinance existing mortgage loans or other liens which are secured of record on a dwelling or farm residence owned and occupied by the veteran as the veteran's home.⁸
- to purchase a one-family residential unit in a condominium housing development or project, if such development or project is approved by the Secretary of Veterans Affairs under criteria which the Secretary must prescribe in regulations.⁹
- to improve a dwelling or farm residence owned by the veteran and occupied by the veteran as the veteran's home through energy efficiency improvements, as specified.¹⁰

- to refinance an existing loan guaranteed, insured, or made under the applicable federal provisions.¹¹
 - to purchase a manufactured home to be permanently affixed to a lot that is owned by the veteran.¹²
 - to purchase a manufactured home and a lot to which the home will be permanently affixed.¹³
 - to refinance, as specified by statute, an existing loan guaranteed, insured, or made under the applicable statutory provisions, that is secured by a manufactured home permanently affixed to a lot that is owned by the veteran.¹⁴
 - to refinance, as specified, an existing loan that was made for the purchase of, and that is secured by, a manufactured home that is permanently affixed to a lot and to purchase the lot to which the manufactured home is affixed.¹⁵
 - to purchase a dwelling to be owned and occupied by the veteran as a home and make energy efficiency improvements.¹⁶
 - to refinance in accordance with the statute a certain type of loan or obligation, and to improve the dwelling securing such loan through energy efficiency improvements, as specified.¹⁷
- No loan may be guaranteed under the applicable statute¹⁸ unless certain statutory conditions are met.¹⁹

Statutes and regulations also specifically provide assistance to certain disabled veterans in acquiring specially adapted housing.²⁰

Provision is also specifically made by federal statute for direct loans to veterans living in rural areas or small cities and towns not near large metropolitan areas, where it is found that private capital is not generally available in such rural area or small city or town for the financing of loans guaranteed for purposes specified in statutes generally pertaining to the purchase of residences,²¹ and which area is designated by the Secretary of Veterans Affairs as a "housing credit shortage area."²² Statutes also specifically authorize the guarantees of loans with regard to manufactured homes and lots which are made for statutorily specified purposes.²³

Under federal statutes, statutorily specified veterans²⁴ are eligible for housing loan benefits, subject to specified limitations.²⁵ Also addressed by statute are adjustable rate mortgages,²⁶ and, in order to enable the purchase of housing in areas where the supply of suitable military housing is inadequate, the conducting of a pilot program by the Secretary of Veterans Affairs under which the Secretary may make periodic or lump sum assistance payments on behalf of an eligible veteran for the purpose of buying down the interest rate on a guaranteed loan to that veteran.²⁷

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Footnotes

- 1 [Carter v. Derwinski](#), 987 F.2d 611 (9th Cir. 1993).
- 2 [38 U.S.C.A. § 3704\(c\)\(2\)](#).
- 3 [38 U.S.C.A. §§ 3701 to 3765](#).
- 4 [38 U.S.C.A. § 3710\(a\)\(1\)](#).
- 5 [38 U.S.C.A. § 3710\(a\)\(2\)](#).
- 6 [38 U.S.C.A. § 3710\(a\)\(3\)](#).
- 7 [38 U.S.C.A. § 3710\(a\)\(4\)](#).
- 8 [38 U.S.C.A. § 3710\(a\)\(5\)](#).
- 9 [38 U.S.C.A. § 3710\(a\)\(6\)](#).

10	38 U.S.C.A. § 3710(a)(7).
11	38 U.S.C.A. § 3710(a)(8).
12	38 U.S.C.A. § 3710(a)(9)(A)(i).
13	38 U.S.C.A. § 3710(a)(9)(A)(ii).
14	38 U.S.C.A. § 3710(a)(9)(B)(i).
15	38 U.S.C.A. § 3710(a)(9)(B)(ii).
16	38 U.S.C.A. § 3710(a)(10).
17	38 U.S.C.A. § 3710(a)(11).
18	38 U.S.C.A. § 3710.
19	38 U.S.C.A. § 3710(b).
20	§ 76.
21	38 U.S.C.A. §§ 3710, 3712.
22	38 U.S.C.A. § 3711.
23	38 U.S.C.A. § 3712.
24	38 U.S.C.A. § 3702(a)(2).
25	38 U.S.C.A. § 3702(a)(1).
26	38 U.S.C.A. § 3707.
27	38 U.S.C.A. § 3708.

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IX. Home, Farm, and Business Loans

§ 130. Home and residential loans—Warranties of houses appraised for guarantee or insurance

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West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  108.1 to 112

Provision is made by statute requiring warranties to be given as to certain houses appraised for guarantee or insurance.¹ The Secretary of Veterans Affairs must require that in connection with any property upon which there is located a dwelling designed principally for not more than a four-family residence and which is appraised for guaranty or insurance before the beginning of construction, the seller or builder, and such other person as may be required by the Secretary to become warrantor, must deliver to the purchaser or owner of such property a warranty that the dwelling is constructed in substantial conformity with the plans and specifications (including any amendments thereof, or changes and variations therein, which have been approved in writing by the Secretary) on which the Secretary based the Secretary's valuation of the dwelling.²

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Footnotes

¹ [38 U.S.C.A. § 3705.](#)

² [38 U.S.C.A. § 3705\(a\).](#)

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IX. Home, Farm, and Business Loans

§ 131. Home and residential loans—Effect of disposal of residential property; assumption; release of liability to Secretary of Veterans Affairs

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West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  [108.1](#) to [112](#)

Provision is made by federal statute for the issuance, under specified conditions, to a veteran who disposes of residential property securing a guaranteed, insured, or direct housing loan obtained by the veteran, a release relieving the veteran of all further liability to the Secretary on account of such loan.¹

Observation:

A veteran remains liable for the loan guarantee indebtedness even though he or she may have transferred the property to a new owner who has assumed liability for, and subsequently defaulted on payment of, the mortgage. In the instance of a mortgage assumption, the veteran remains liable to the Department of Veterans Affairs unless he or she secures a release of liability.²

Specific provision is made by statute with regard to assumption of a veteran's housing loan and the release of the veteran from liability to the Secretary of Veterans Affairs with regard to such assumed loan.³ Under this provision, except as otherwise provided by statute,⁴ if a veteran or any other person disposes of residential property securing a loan guaranteed, insured, or made under the federal statutes generally pertaining to loans to veterans for homes and small businesses, and the veteran or other person notifies the holder of the loan in writing before the property is disposed of, the veteran or other person, as the case may

be, will be relieved of all further liability to the Secretary with respect to the loan (including liability for any loss resulting from any default of the purchaser or any subsequent owner of the property), and the application for assumption will be approved if the holder determines that the loan is current,⁵ and the purchaser of the property from such veteran or other person is obligated by contract to purchase such property and to assume full liability for the repayment of the balance of the loan remaining unpaid and has assumed by contract all of the obligations of the veteran under the terms of the instruments creating and securing the loan⁶ and qualifies from a credit standpoint, to the same extent as if the purchaser were a veteran eligible under a specified provision pertaining generally to residential loans to veterans, for a guaranteed or insured or direct loan in an amount equal to the unpaid balance of the obligation for which the purchaser is to assume liability.⁷

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Footnotes

- 1 38 U.S.C.A. § 3713(a).
As to the default of a veteran's loan, generally, see § 135.
- 2 Buzinski v. Brown, 6 Vet. App. 360 (1994).
- 3 38 U.S.C.A. § 3714.
- 4 38 U.S.C.A. § 3714(f).
- 5 38 U.S.C.A. § 3714(a)(1)(A).
- 6 38 U.S.C.A. § 3714(a)(1)(B)(i).
- 7 38 U.S.C.A. § 3714(a)(1)(B)(ii).

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§ 132. Home and residential loans—Insurance on mortgages on large-scale housing projects

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In order to assist and encourage the application of cost-reduction techniques through large-scale modernized site construction of housing and the erection of houses produced by modern industrial processes, the Secretary of Housing and Urban Development is authorized to insure mortgages (including advances on such mortgages during construction) which are eligible for insurance¹ where the mortgage:

- (1) is made to and held by a mortgagee approved by the Secretary as responsible and able to serve the mortgage properly;²
- (2) covers property held by a mortgagor approved by the Secretary upon which there is to be constructed or erected dwelling units for not less than 25 families consisting of a group of single-family dwellings approved by the Secretary for mortgage insurance prior to the beginning of construction;³
- (3) involves a principal obligation in an amount not to exceed a specified percent of the amount which the Secretary estimates will be the value of the completed property or project, with specified exceptions,⁴ and not to exceed a sum computed on the individual dwellings comprising the total project as specified by statute;⁵ and
- (4) provides for complete amortization by periodic payments within such terms as the Secretary must prescribe and must bear interest (exclusive of premium charges for insurance) at not to exceed a specified percent per annum on the amount of the principal obligation outstanding at any time, with specified exceptions.⁶

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Footnotes

¹ [12 U.S.C.A. § 1746\(a\).](#)

² [12 U.S.C.A. § 1746\(b\)\(1\).](#)

- 3 12 U.S.C.A. § 1746(b)(1).
- 4 12 U.S.C.A. § 1746(b)(3)(A).
- 5 12 U.S.C.A. § 1746(b)(3)(B).
- 6 12 U.S.C.A. § 1746(b)(4).

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§ 133. Small business loans

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West's Key Number Digest, [Armed Services](#)  108.1, 112

Federal statutes specifically provide for small business loans to veterans.¹

Under the applicable provisions, subject to certain statutory limitations,² the Secretary of Veterans Affairs is authorized to provide financial assistance to veterans' small business concerns for the purpose of financing plant construction, conversion, or expansion (including the acquisition of land);³ financing the acquisition of equipment, facilities, machinery, supplies, or materials;⁴ or supplying such concerns with working capital.⁵ Subject to the specific statutory requirements,⁶ and exceptions,⁷ financial assistance to veterans for small businesses could be provided in the form of loan guaranties⁸ or direct loans.⁹ Provision is made by statute authorizing the Secretary to undertake the veterans' small business concern's obligation to make payments under such loan or, if the loan is a direct loan made by the Secretary, to suspend such obligation, under specified circumstances,¹⁰ for the execution of notes or other documents evidencing the direct or guaranteed business loan, and setting forth the joint and several liability of individuals to United States for the amount of such direct loan or, in the case of a guaranteed loan, for any amount paid by the Secretary on account of such loan;¹¹ the requirement, with specified exceptions, that such loans be submitted to and approved by the Secretary;¹² the interest on such loans;¹³ the maturity of loans;¹⁴ certain preferences for disabled veterans;¹⁵ and a revolving fund in the Federal Treasury to be known as the "Department of Veterans Affairs Small Business Loan Revolving Fund."¹⁶

In addition, the Veterans Entrepreneurship and Small Business Development Act of 1999 expands existing and establishes new assistance programs for veterans who own or operate small businesses by: (1) expanding the eligibility for certain small business assistance programs to include veterans; (2) directing certain departments and agencies to take actions that enhance small business assistance to veterans; and (3) establishing new institutions to provide small business assistance to veterans or to support the institutions that provide such assistance.¹⁷

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Footnotes

- 1 38 U.S.C.A. §§ 3741 to 3751.
- 2 38 U.S.C.A. § 3742(b).
- 3 38 U.S.C.A. § 3742(a)(1)(A).
- 4 38 U.S.C.A. § 3742(a)(1)(B).
- 5 38 U.S.C.A. § 3742(a)(1)(C).
- 6 38 U.S.C.A. § 3742(a)(3).
- 7 38 U.S.C.A. § 3742(d).
- 8 38 U.S.C.A. § 3742(a)(2)(A).
- 9 38 U.S.C.A. § 3742(a)(2)(B).
- 10 38 U.S.C.A. § 3742(e).
- 11 38 U.S.C.A. § 3743.
- 12 38 U.S.C.A. § 3744.
- 13 38 U.S.C.A. § 3745.
- 14 38 U.S.C.A. § 3746.
- 15 38 U.S.C.A. § 3748.
- 16 38 U.S.C.A. § 3749.
- 17 15 U.S.C.A. § 657b note, PL 106-50, August 17, 1999, 113 Stat 233.

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§ 134. Administrative powers and duties of Secretary of Veterans Affairs, generally

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West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  108.1 to 112

The Secretary of Veterans Affairs has statutorily specified powers and duties in connection with the administration of the federal statutory provisions pertaining to home and small business loans to veterans.¹ In this regard, the Secretary may sue and be sued in his or her official capacity in any court of competent jurisdiction, state or federal;² subject to specific limitations, consent to the modification, with respect to rate of interest, time of payment of principal or interest or any portion thereof, security or other provisions of any note, contract, mortgage or other instrument securing a loan which has been guaranteed, insured, made, or acquired under the applicable provisions;³ pay, or compromise, any claim on, or arising because of, any such guaranty or insurance;⁴ pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption;⁵ purchase at any sale, public or private, upon such terms and for such prices as the Secretary determines to be reasonable, and take title to, property, real, personal, or mixed, and similarly sell, at public or private sale, exchange, assign, convey, or otherwise dispose of any such property;⁶ and complete, administer, operate, obtain, and pay for insurance on, and maintain, renovate, repair, modernize, lease, or otherwise deal with any property acquired or held pursuant to the statutes pertaining to home and small business loans to veterans.⁷

The Secretary also has specified authority with respect to any property improved by a one- to four-family dwelling inspected during construction by the Department of Veterans Affairs or the Federal Housing Administration which the Secretary finds to have structural defects seriously affecting the livability of the property, to make expenditures for correcting such defects, paying the claims of the owner of the property arising from such defects, or acquiring title to the property.⁸ Also, the Secretary is required by statute to take appropriate steps to authorize attorneys employed by the Department of Veterans Affairs to exercise the right of the United States to bring suit in court to foreclose a loan made or acquired by the Secretary and to recover possession of any property acquired by the Secretary, and the Secretary is authorized to acquire the services of attorneys, other than those who are employees of the Department of Veterans Affairs, to exercise that right.⁹ Further, the Secretary has statutorily specified duties with regard to appraisers and appraisals of property for purposes of the provisions for home and small business loans

to veterans,¹⁰ as well as certain reporting duties with regard to the Veterans Housing Benefit Program Fund,¹¹ and concerning activities under the statutes pertaining to loans to veterans for homes and small businesses.¹²

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Footnotes

- 1 38 U.S.C.A. § 3720.
A federal regulation provides for the sale of loans by the Secretary. 38 C.F.R. § 36.4600.
- 2 38 U.S.C.A. § 3720(a)(1).
- 3 38 U.S.C.A. § 3720(a)(2).
- 4 38 U.S.C.A. § 3720(a)(3).
- 5 38 U.S.C.A. § 3720(a)(4).
- 6 38 U.S.C.A. § 3720(a)(5).
- 7 38 U.S.C.A. § 3720(a)(6).
- 8 38 U.S.C.A. § 3727.
- 9 38 U.S.C.A. § 3730(a).
- 10 38 U.S.C.A. § 3731.
- 11 38 U.S.C.A. § 3734.
- 12 38 U.S.C.A. § 3736.

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§ 135. Default; reimbursement for loss; procedures applicable

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West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  108.1

When a veteran takes advantage of the Department of Veterans Affairs' guarantee program, two legal relationships are established, both of which are governed by federal law. First, the Department promises to reimburse the lender if the veteran defaults, up to the face value of the guarantee.¹ Second, the veteran promises to reimburse the Department for any amount the Department pays the lender.² This is an obligation owed directly to the Department, which it may recover by subrogating itself to any remaining rights of the lender³ or by pursuing an independent right of indemnity, which derives from a contract independent of the mortgage, against the veteran.⁴ Both rights can be fully enforced; indeed, not only are the rights of subrogation and indemnity not in conflict, but they are also complementary and mutually reinforcing.⁵

In the event of default in the payment of any loan guaranteed under the statutory provisions pertaining to home and small business loans to veterans,⁶ the holder of the obligation must notify the Secretary of such default.⁷ Upon receipt of such notice, the Secretary may, subject to a specified provision,⁸ pay to such holder the guaranty not in excess of the pro rata portion of the amount originally guaranteed.⁹ Except as provided in a specified provision,¹⁰ if the Secretary makes such a payment, the Secretary will be subrogated to the rights of the holder of the obligation to the extent of the amount paid on the guaranty.¹¹

Provision is also made by federal statute for financing by loans from the Secretary of Veterans Affairs of purchases made during any fiscal year of real property acquired by the Secretary as the result of a default on a loan guaranteed.¹²

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Footnotes

¹ [Carter v. Derwinski](#), 987 F.2d 611 (9th Cir. 1993).

² [Carter v. Derwinski](#), 987 F.2d 611 (9th Cir. 1993).

3 [Carter v. Derwinski, 987 F.2d 611 \(9th Cir. 1993\).](#)

4 [Carter v. Derwinski, 987 F.2d 611 \(9th Cir. 1993\).](#)

A veteran is liable to the Department of Veterans Affairs through either indemnification or subrogation for any compensation paid by the Department to the mortgagee due to default and foreclosure on the veteran's VA-guaranteed mortgage. [Buzinski v. Brown, 6 Vet. App. 360 \(1994\).](#)

Where the Department of Veterans Affairs pays lenders despite the lack of any legal obligation to do so, the payment is "gratuitous," and the Department is not entitled to indemnification. [U.S. v. Davis, 961 F.2d 603 \(7th Cir. 1992\).](#)

5 [Carter v. Derwinski, 987 F.2d 611 \(9th Cir. 1993\).](#)

6 38 U.S.C.A. §§ 3701 to 3765.

7 38 U.S.C.A. § 3732(a)(1).

8 38 U.S.C.A. § 3732(c).

9 38 U.S.C.A. § 3732(a)(1).

10 38 U.S.C.A. § 3703(e).

11 38 U.S.C.A. § 3732(a)(1).

12 38 U.S.C.A. § 3733.

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Karl Oakes, J.D.

IX. Home, Farm, and Business Loans

§ 136. Effect of attempt to use loan guaranty for one not entitled thereto

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  108.1

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[Validity of agreement by veteran purchasing property under loan guaranty to hold property on trust and the like for another furnishing the consideration, 33 A.L.R.2d 1285](#)

An agreement by a veteran purchasing property under a loan guaranty to hold property in trust, and the like, for another furnishing the consideration generally is invalid.¹ An oral agreement by a veteran to take title to a house in his or her own name and thereby secure the benefits of a "GI loan" at a lower interest rate, a longer term, and other advantages, and to hold the title in trust for a relative who furnishes the money for obtaining and preserving the property, is illegal and invalid, as an attempt to obtain for the relative benefits under the act to which only veterans are entitled, even though the veteran lives in the house with the relative.² Specific enforcement of a contract, under which the plaintiff has furnished the down payment and expenses to enable a veteran to obtain a guaranteed loan for the purchase of certain property and where the veteran has agreed that after the purchase is made, he or she will execute to the plaintiff a warranty deed to the property, subject to the security deed, the defendant obtaining only the right to occupy, as a tenant, one of the apartments to be constructed in the building will be denied.³

On the other hand, despite the fact that the remedy of constructive trust is not available, when the purpose of taking title in a veteran's name, upon his or her oral promise to reconvey, is to obtain a guaranteed loan for one not entitled to its benefits, an equitable lien will be impressed upon the property in favor of the nonveteran in the interests of justice, limited in amount to the money paid by him or her out of his or her own funds at the closing and thereafter in reduction of the principal of the

mortgage indebtedness and to the extent to which the moneys expended by him or her for permanent improvements enhanced the value of the premises.⁴

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Footnotes

- 1 [Glosser v. Powers](#), 209 Ga. 149, 71 S.E.2d 230 (1952); [Perkins v. Hilton](#), 329 Mass. 291, 107 N.E.2d 822, 33 A.L.R.2d 1281 (1952); [Dunn v. Dunn](#), 1 A.D.2d 888, 149 N.Y.S.2d 351 (2d Dep't 1956).
- 2 [Perkins v. Hilton](#), 329 Mass. 291, 107 N.E.2d 822, 33 A.L.R.2d 1281 (1952).
- 3 [Glosser v. Powers](#), 209 Ga. 149, 71 S.E.2d 230 (1952).
- 4 [Badami v. Badami](#), 29 A.D.2d 645, 286 N.Y.S.2d 590 (2d Dep't 1968).

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IX. Home, Farm, and Business Loans

§ 137. Assistance through Farmers Home Administration

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West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  108.1

The Secretary of Agriculture is authorized by applicable statutes¹ to extend financial assistance through the Farmers Home Administration to owners of farms to enable them to construct, improve, alter, repair, or replace dwellings and other farm buildings on their farms to provide them, their tenants, lessees, sharecroppers, and laborers with decent, safe, and sanitary living conditions and adequate farm buildings.² As between eligible applicants seeking assistance under the applicable provisions, the Secretary must give preference to veterans and the families of deceased servicemen.³

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Footnotes

- ¹ [42 U.S.C.A. §§ 1471 to 1490t.](#)
- ² [Am. Jur. 2d, Agriculture § 25.](#)
- ³ [42 U.S.C.A. § 1477.](#)

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X. Educational Assistance

A. Assistance to Veterans of United States Armed Forces

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X. Educational Assistance

A. Assistance to Veterans of United States Armed Forces

1. In General

§ 138. Introduction to educational assistance programs

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West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  105

Federal statutes establish an All-Volunteer Force Educational Assistance Program,¹ assistance under which is sometimes referred to as "New GI Bill" benefits.² The purposes of the applicable statutes include providing for vocational readjustment and restoring lost educational opportunities to those servicemen and women who served on active duty after June 30, 1985.³

Provision is also made by statute with regard to post-Vietnam era veterans' educational assistance,⁴ a purpose of which is to provide educational assistance to those men and women who entered the Armed Forces after December 31, 1976, and before July 1, 1985,⁵ and for post-9/11 educational assistance,⁶ available to certain individuals who, commencing on or after September 11, 2001, have served for a specified aggregate time on active duty in the Armed Forces and who have met the applicable additional requirements after completion of service.⁷

Observation:

Congress has also enacted statutes providing educational assistance to veterans,⁸ and the administration of such educational benefits,⁹ under which provisions no educational assistance could be afforded any eligible veteran after December 31, 1989.¹⁰ Some of these statutes have been made applicable to the more current All-Volunteer Force Educational Assistance Program¹¹ and Post-9/11 Educational Assistance Program.¹²

CUMULATIVE SUPPLEMENT

Statutes:

[38 U.S.C.A. § 3315B](#), as added effective August 8, 2020, provides that a veteran entitled to educational assistance is also entitled to payment for a covered preparatory course.

[38 U.S.C.A. § 3680](#) Note, as added by the Student Veteran Coronavirus Response Act effective between the period beginning on March 1, 2020, and ending on December 21, 2020, provides that the Secretary of Veterans Affairs may pay allowances to an eligible veteran or eligible person under section [38 U.S.C.A. § 3680\(a\)\(2\)\(A\)](#), if the veteran or person is enrolled in a program or course of education that is provided by an educational institution that is closed by reason of an emergency situation, or is suspended by reason of an emergency situation.

[38 U.S.C.A. §§ 7691 to 7697](#), as added effective June 6, 2018, establish the specialty education loan repayment program to assist, through the establishment of an incentive program for certain individuals employed in the Veterans Health Administration, in meeting the staffing needs of the Veterans Health Administration for physicians in medical specialties for which the Secretary determines recruitment or retention of qualified personnel is difficult.

[Pub. L. 116-134, 134 Stat. 276](#) (March 26, 2020), entitled the Support for Veterans in Effective Apprenticeships Act of 2019, is designed to help registered apprenticeship programs to better serve veterans.

[38 C.F.R. §§ 17.525 to 17.531](#), as added effective August 28, 2020, establish the Specialty Education Loan Repayment Program (SELRP), an incentive program for certain individuals to meet Department of Veterans Affairs' (VA's) need for physicians in medical specialties for which VA determines that recruitment and retention of qualified personnel is difficult ([38 C.F.R. § 17.527](#)). Assistance under the SELRP may be in addition to other assistance available to individuals ([38 C.F.R. § 17.528](#)) under the Educational Assistance Program under [38 U.S.C.A. § 7601](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 [38 U.S.C.A. §§ 3001 to 3035](#).
Except to the extent otherwise specifically provided in [38 U.S.C.A. §§ 3001 to 3035](#), the educational assistance programs established by such statutes are to be administered by the Department of Veterans Affairs. [38 U.S.C.A. § 3035\(a\)](#).
- 2 [Harvey v. Brown](#), 6 Vet. App. 416, 91 Ed. Law Rep. 994 (1994).
- 3 [38 U.S.C.A. § 3001\(3\)](#).
- 4 [38 U.S.C.A. §§ 3201 to 3243](#).
- 5 [38 U.S.C.A. § 3201\(1\)](#).
- 6 [38 U.S.C.A. §§ 3301 to 3325](#).
- 7 [§ 145](#).
- 8 [38 U.S.C.A. §§ 3451 to 3493](#).
- 9 [38 U.S.C.A. §§ 3670 to 3698](#).

- 10 38 U.S.C.A. § 3462(e).
- 11 38 U.S.C.A. § 3034(a)(1), specifying that except as otherwise provided, the provisions of 38 U.S.C.A. §§ 3470, 3471, 3474, 3476, 3482(g), 3483, 3485 and the provisions of 38 U.S.C.A. §§ 3670 to 3698 (with the exception of 38 U.S.C.A. §§ 3680(c), 3680(f), 3686(a), 3687) apply to the provision of educational assistance under 38 U.S.C.A. §§ 3301 to 3325.
- 12 38 U.S.C.A. § 3323(a)(1), specifying that except as otherwise provided, the provisions specified in 38 U.S.C.A. §§ 3034(a)(1), 3680(c) apply to the provision of educational assistance under 38 U.S.C.A. §§ 3001 to 3035. Note that 38 U.S.C.A. § 3034(a)(1) incorporates by reference 38 U.S.C.A. §§ 3470, 3471, 3474, 3476, 3482(g), 3483, 3485 and the provisions of 38 U.S.C.A. §§ 3670 to 3698 (with the exception of) 38 U.S.C.A. §§ 3680(c), 3680(f), 3686(a), 3687.

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X. Educational Assistance

A. Assistance to Veterans of United States Armed Forces

1. In General

§ 139. Counseling and related services

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West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  105

Provision is made by federal statute with regard to educational and vocational counseling and related services to be provided to veterans.¹ Under such provisions, the Secretary of Veterans Affairs must make counseling services available upon request to an individual: (1) who was eligible for educational assistance under specified statutory provisions;² (2) who was discharged or released from active duty under conditions other than dishonorable if not more than one year has elapsed since the date of such last discharge or release from active duty;³ or (3) who is serving on active duty in any state with the Armed Forces and is within 180 days of the estimated date of such individual's discharge or release from active duty under conditions other than dishonorable, including those who are making a determination of whether to continue as members of the Armed Forces.⁴ The counseling services include such educational and vocational counseling and guidance, testing, and other assistance as the Secretary determines necessary to aid the individual in selecting an educational or training objective and an educational institution or training establishment appropriate for the attainment of such objective⁵ or an employment objective that would be likely to provide such individual with satisfactory employment opportunities in the light of the individual's personal circumstances.⁶ In any case in which the Secretary has rated the individual as being incompetent, the counseling services must be required to be provided to the individual before the selection of a program of education or training.⁷

At such intervals as the Secretary determines necessary, the Secretary is to make available information concerning the need for general education and for trained personnel in the various crafts, trades, and professions.⁸ Facilities of other federal agencies collecting such information shall be utilized to the extent the Secretary determines practicable.⁹ The Secretary must also take appropriate steps (including individual notification where feasible) to acquaint all individuals entitled to educational counseling with the availability and advantages of counseling services.¹⁰

Reminder:

The above provisions are applicable to the All-Volunteer Force Educational Assistance Program and the Post-9/11 Educational Assistance program.¹¹

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Footnotes

- | | |
|----|----------------------------|
| 1 | 38 U.S.C.A. § 3697A. |
| 2 | 38 U.S.C.A. § 3697A(b)(1). |
| 3 | 38 U.S.C.A. § 3697A(b)(2). |
| 4 | 38 U.S.C.A. § 3697A(b)(3). |
| 5 | 38 U.S.C.A. § 3697A(a)(1). |
| 6 | 38 U.S.C.A. § 3697A(a)(2). |
| 7 | 38 U.S.C.A. § 3697A(c). |
| 8 | 38 U.S.C.A. § 3697A(d). |
| 9 | 38 U.S.C.A. § 3697A(d). |
| 10 | 38 U.S.C.A. § 3697A(e). |
| 11 | § 138. |

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X. Educational Assistance

A. Assistance to Veterans of United States Armed Forces

2. Eligibility and Entitlement

a. All-Volunteer Force Educational Assistance Program

§ 140. All-Volunteer Force Educational Assistance Program; service requirements

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  105

Entitlement to basic educational assistance,¹ as well as certain tutorial assistance benefits,² for certain discharged veterans under the All-Volunteer Force Educational Assistance Program is based on service,³ educational,⁴ and discharge or continued service⁵ requirements.

Specific provision is also made entitling certain persons, who previously elected not to receive educational assistance benefits, to, under statutorily specified conditions, either prior or after discharge or separation from service, withdraw such elections and subsequently enroll so as to be eligible for educational benefits.⁶

A federal statute also makes provision with regard to basic educational assistance entitlement under the applicable provisions⁷ for service in the Selected Reserve.⁸

Observation:

Neither the Department of Veterans Affairs nor the Court of Appeals for Veterans Claims can extend New GI Bill benefits beyond those statutorily authorized out of sympathy for a particular veteran.⁹

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Footnotes

- 1 For the purposes of [38 U.S.C.A. §§ 3001 to 3035](#), the term "basic educational assistance" means educational assistance provided under [38 U.S.C.A. §§ 3011 to 3020](#). [38 U.S.C.A. § 3002\(1\)](#).
- 2 [38 U.S.C.A. § 3019](#).
- 3 [38 U.S.C.A. § 3011\(a\)\(1\)](#).

A veteran who had completed his active duty service in July 1980 was not entitled to educational benefits under the Montgomery G.I. Bill as such benefits were available only to veterans who became a member of the Armed Forces after June 30, 1985. [Mays v. Shinseki, 25 Vet. App. 256 \(2012\)](#), motion for full-court review denied, [2012 WL 6651975 \(Veterans App. 2012\)](#).

Where a veteran had enlisted in the Army for an initial obligated period of four years and was discharged after having served 25 months and 18 days, he did not satisfy the length-of-service minimum for either of the eligibility requisites for New GI Bill benefits. [Harvey v. Brown, 6 Vet. App. 416, 91 Ed. Law Rep. 994 \(1994\)](#).

A veteran was not eligible for educational benefits since his final discharge was general, a March 1988 honorable discharge was not based on three years' continuous active service commencing after June 30, 1985, and his remaining honorable discharges were granted prior to June 30, 1985. [Carr v. Brown, 5 Vet. App. 2 \(1993\)](#).
- 4 [§ 141](#).
- 5 [§ 142](#).
- 6 [38 U.S.C.A. §§ 3018 to 3018C](#).
- 7 [38 U.S.C.A. §§ 3001 to 3035](#).
- 8 [38 U.S.C.A. § 3012](#).

The term "Selected Reserve" means the Selected Reserve of the Ready Reserve of any of the reserve components (including the Army National Guard of the United States and the Air National Guard of the United States) of the Armed Forces, as required to be maintained under [10 U.S.C.A. § 10143\(a\)](#); [38 U.S.C.A. § 3002\(4\)](#).
- 9 [Harvey v. Brown, 6 Vet. App. 416, 91 Ed. Law Rep. 994 \(1994\)](#).

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X. Educational Assistance

A. Assistance to Veterans of United States Armed Forces

2. Eligibility and Entitlement

a. All-Volunteer Force Educational Assistance Program

§ 141. Educational requirements

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  105

To qualify for basic educational assistance, an otherwise qualifying individual must have completed the requirements of a secondary school diploma (or equivalency certificate) or successfully completed (or otherwise receives academic credit for) the equivalent of 12 semester hours in a program of education leading to a standard college degree.¹

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Footnotes

1

[38 U.S.C.A. § 3011\(a\)\(2\)](#).

As to the service requirements for basic educational assistance, see [§ 140](#).

As to continued service or discharge requirements, see [§ 142](#).

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X. Educational Assistance

A. Assistance to Veterans of United States Armed Forces

2. Eligibility and Entitlement

a. All-Volunteer Force Educational Assistance Program

§ 142. Continued service; type of discharge

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  105

After completing the qualifying service requirement,¹ and in addition to meeting the minimum educational requirement,² to qualify for basic educational assistance, the individual must³—

— continue on active duty.

— be discharged from active duty with an honorable discharge.

— be released after service on active duty characterized by the Secretary concerned as honorable service and be: (1) placed on the retired list; (2) transferred to the Fleet Reserve or Fleet Marine Corps Reserve; or (3) placed on the temporary disability retired list.

— be released from active duty for further service in a reserve component of the Armed Forces after service on active duty characterized by the Secretary concerned as honorable service.

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Footnotes

¹ [§ 140.](#)

² [§ 141.](#)

³ [38 U.S.C.A. § 3011\(a\)\(3\).](#)

A veteran was not eligible for educational benefits since his final discharge was general, a March 1988 honorable discharge was not based on three years' continuous active service commencing after June 30, 1985, and his remaining honorable discharges were granted prior to June 30, 1985. [Carr v. Brown, 5 Vet. App. 2 \(1993\)](#).

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X. Educational Assistance

A. Assistance to Veterans of United States Armed Forces


2. Eligibility and Entitlement

a. All-Volunteer Force Educational Assistance Program

§ 143. Time limitations on period of assistance and use of eligibility

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  105

Subject to a statutory provision limiting the period of assistance,¹ and subject to stated exceptions, each individual entitled to basic educational assistance under the basic provision for such assistance is entitled to a specified number of months of educational assistance benefits under the provisions applicable to recently discharged veterans or the equivalent thereof in part-time educational assistance.² A veteran who, pursuant to statute, is limited to educational assistance benefits for an aggregate period not to exceed a given number of months is not eligible for education benefits payable for periods of enrollment after the date when the limit is reached.³ Provision is also made with regard to the duration of assistance for persons serving in the Selected Reserve⁴ and for certain veterans who previously elected not to receive educational assistance, who are subsequently entitled to withdraw such elections and receive such assistance.⁵

Specific provision is also made by statute with regard to the time limitations for the use of eligibility and entitlement to educational assistance benefits.⁶

Observation:

A veteran was not entitled to educational benefits under chapter 30 for an enrollment in college from August 31 to September 14, 1992, where the VA received the university's enrollment certification on January 18, 1994; under the regulation, the commencing

date of any award would have been January 18, 1993, that is, one year before the VA received the enrollment certification, and since the commencing date of any award was after the enrollment period for which the veteran sought benefits, no award could be made.⁷

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Footnotes

- 1 38 U.S.C.A. § 3695.
- 2 38 U.S.C.A. § 3013(a)(1).
- 3 *Davenport v. Principi*, 16 Vet. App. 522 (2002).
- 4 38 U.S.C.A. § 3013(b).
- 5 38 U.S.C.A. § 3013(c), (d).
- 6 38 U.S.C.A. § 3031.
- 7 *Taylor v. West*, 11 Vet. App. 436 (1998).

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X. Educational Assistance

A. Assistance to Veterans of United States Armed Forces

2. Eligibility and Entitlement

b. Other Programs

§ 144. Post-Vietnam era veterans' educational assistance

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  105

The eligibility requirements for post-Vietnam era veterans' educational assistance are specified by statute.¹ Subject to certain statutory provisions limiting the aggregate period for which any person may receive assistance under two or more programs of educational or vocational assistance administered by the Department of Veterans Affairs,² a participant in the program will be entitled to a maximum of 36 monthly benefit payments (or their equivalent in the event of part-time benefits).³ Subject to certain statutory rules, educational assistance benefits will generally not be afforded an eligible veteran more than 10 years after the date of such veteran's last discharge or release from active duty.⁴

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Footnotes

- ¹ 38 U.S.C.A. § 3221.
- ² 38 U.S.C.A. § 3695.
- ³ 38 U.S.C.A. § 3231(a).
- ⁴ 38 U.S.C.A. § 3232(a).

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X. Educational Assistance

A. Assistance to Veterans of United States Armed Forces

2. Eligibility and Entitlement

b. Other Programs

§ 145. Post-9/11 educational assistance

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  105

Post-9/11 educational assistance is, as provided in the governing statute, available to certain individuals who, commencing on or after September 11, 2001, have served for a specified aggregate time on active duty in the Armed Forces and who have met the applicable additional requirements after completion of service.¹

Subject to certain statutory provisions limiting the aggregate period for which any person may receive assistance under two or more programs of educational or vocational assistance administered by the Department of Veterans Affairs,² and except as otherwise provided, an individual entitled to post-9/11 educational assistance is generally entitled to 36 months of educational assistance.³

Subject to specified exceptions, the period during which an individual entitled to the post-9/11 educational assistance may use such individual's entitlement expires at the end of the 15-year period beginning on the date of such individual's last discharge or release from active duty.⁴

CUMULATIVE SUPPLEMENT

Statutes:

[38 U.S.C.A. § 3321\(a\)](#), as amended effective August 12, 2017, provides that subject to specified exceptions, the period during which an individual entitled to the post-9/11 educational assistance may use such individual's entitlement: in the case of an

individual whose last discharge or release from active duty is before January 1, 2013, expires at the end of the 15-year period beginning on the date of such discharge or release; or in the case of an individual whose last discharge or release from active duty is on or after January 1, 2013, does not expire.

[38 U.S.C.A. § 3321\(h\)\(5\)](#), as amended by the Student Veteran Coronavirus Response Act effective between the period beginning on March 1, 2020, and ending on December 21, 2020, provides that in any case in which the Secretary of Veterans Affairs determines that an individual to whom entitlement is transferred under this section has been prevented from pursuing the individual's chosen program of education before the individual attains the age of 26 years because the educational institution closed (temporarily or permanently) under an established policy based on an Executive order of the President or due to an emergency situation, the Secretary must extend the period during which the individual may use such entitlement for a period equal to the number of months that the individual was so prevented from pursuing the program of education.

[38 U.S.C.A. § 3327](#), as added effective December 16, 2016, provides that a veteran may elect to receive Post-9/11 educational assistance if such individual, as of August 1, 2009: is entitled to educational assistance under applicable statute and has used, but retains unused, entitlement; or is a member of the Armed Forces who is not entitled to basic educational assistance by reason of an election; and who, as of the date of the individual's election under this paragraph, meets the requirements for entitlement to educational assistance under this chapter.

[END OF SUPPLEMENT]

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Footnotes

- | | |
|---|---|
| 1 | 38 U.S.C.A. § 3311(b) . |
| 2 | 38 U.S.C.A. § 3695 . |
| 3 | 38 U.S.C.A. § 3312(a) . |
| 4 | 38 U.S.C.A. § 3321 . |

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X. Educational Assistance


A. Assistance to Veterans of United States Armed Forces

3. Selection of, and Enrollment in, Program of Education

§ 146. Veterans' organizations, generally

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West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  105

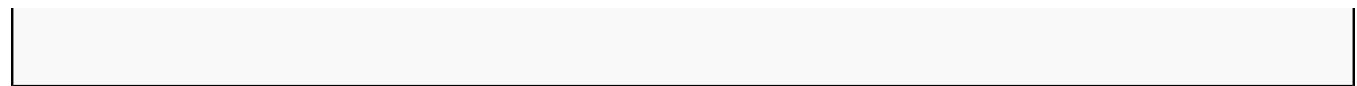
Generally, each eligible veteran may select a program of education to assist the veteran in attaining an educational, professional, or vocational objective at any approved educational institution selected by the veteran, which will accept and retain the veteran as a student or trainee in any field or branch of knowledge which such institution finds the veteran qualified to undertake or pursue.¹

An eligible veteran may not enroll in any course offered by an educational institution not located in a state unless that educational institution is an approved institution of higher learning and the course is approved by the Secretary.² The Secretary may deny or discontinue educational assistance in the case of any veteran enrolled in an institution of higher learning not located in a state if the Secretary determines that such enrollment is not in the best interest of the veteran or the federal government.³

The Secretary may not approve the enrollment of an eligible veteran in any course offered by an institution which utilizes advertising, sales, or enrollment practices of any type which are erroneous, deceptive, or misleading either by actual statement, omission, or intimation.⁴

Reminder:

The above provisions are all applicable to the All-Volunteer Force Educational Assistance Program and the Post-9/11 Educational Assistance program.⁵



CUMULATIVE SUPPLEMENT

Statutes:

[38 U.S.C.A. § 3696\(a\)](#), as amended effective January 5, 2021, provides that a educational institution with an approved course or program of education, and an entity that owns such an educational institution, will not engage in substantial misrepresentation as described in [38 U.S.C.A. § 3696\(b\)](#).

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Footnotes

- | | |
|---|--|
| 1 | 38 U.S.C.A. § 3470. |
| 2 | 38 U.S.C.A. § 3476. |
| 3 | 38 U.S.C.A. § 3476. |
| 4 | 38 U.S.C.A. § 3696(a). |
| 5 | § 138. |

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X. Educational Assistance


A. Assistance to Veterans of United States Armed Forces

3. Selection of, and Enrollment in, Program of Education

§ 147. Applications; approval thereof

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  105

Any eligible veteran who desires to initiate a program of education must submit an application to the Secretary of Veterans Affairs which must be in such form, and contain such information, as the Secretary prescribes.¹ The Secretary must approve the application unless he or she finds that the veteran is not eligible for or entitled to the educational assistance for which application is made, the veteran's selected educational institution or training establishment fails to meet applicable statutory requirements, or the veteran's enrollment in, or pursuit of, the program of education selected would violate any provision of the specified statutes, or the veteran is already qualified, by reason of previous education or training, for the educational, professional, or vocational objective for which the program of education is offered.² The Secretary must notify the veteran of the approval or disapproval of the veteran's application.³

The Secretary may not approve the enrollment of an eligible veteran in statutorily specified courses or under specified circumstances.⁴

Reminder:

The above provisions are applicable to the All-Volunteer Force Educational Assistance Program and the Post-9/11 Educational Assistance program.⁵



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Footnotes

- | | |
|---|----------------------|
| 1 | 38 U.S.C.A. § 3471. |
| 2 | 38 U.S.C.A. § 3471. |
| 3 | 38 U.S.C.A. § 3471. |
| 4 | 38 U.S.C.A. § 3680A. |
| 5 | § 138. |

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77 Am. Jur. 2d Veterans and Veterans Laws § 148

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X. Educational Assistance

A. Assistance to Veterans of United States Armed Forces

3. Selection of, and Enrollment in, Program of Education

§ 148. Enrollment in refresher or preparatory courses

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  105

Under both the All-Volunteer Force Educational Assistance Program¹ and the Post-Vietnam Era Veterans Educational Assistance Program,² the Secretary of Veterans Affairs may, without regard to certain other provisions of law as to the enrollment of an eligible veteran in a program of education in which the veteran is "already qualified," and pursuant to such regulations as the Secretary prescribes, approve the enrollment of such individual in refresher courses (including courses which will permit such individual to update knowledge and skills or be instructed in the technological advances which have occurred in the individual's field of employment during and since the period of such veteran's active military service), deficiency courses, or other preparatory or special education or training courses necessary to enable the individual to pursue an approved program of education.³

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Footnotes

- ¹ 38 U.S.C.A. § 3034(a)(3).
- ² 38 U.S.C.A. § 3241(a)(2).
- ³ 38 U.S.C.A. §§ 3034(a)(3), 3241(a)(2).

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77 Am. Jur. 2d Veterans and Veterans Laws § 149

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X. Educational Assistance


A. Assistance to Veterans of United States Armed Forces

3. Selection of, and Enrollment in, Program of Education

§ 149. Flight training

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  105

Under both the All-Volunteer Force Educational Assistance Program¹ and the Post-Vietnam Era Veterans Educational Assistance Program,² the Secretary of Veterans Affairs may approve the pursuit of flight training, in addition to a course of flight training that may be approved under a separate provision,³ by an individual entitled to basic educational assistance if: (1) such training is generally accepted as necessary for the attainment of a recognized vocational objective in the field of aviation;⁴ (2) the individual possesses a valid private pilot certificate and meets the medical requirements necessary for a commercial pilot certificate;⁵ and (3) the flight school courses meet Federal Aviation Administration (FAA) standards for such courses and are approved by the FAA and the state approving agency.⁶

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Footnotes

- ¹ 38 U.S.C.A. § 3034(d).
- ² 38 U.S.C.A. § 3241(b).
- ³ 38 U.S.C.A. § 3680A(b).
- ⁴ 38 U.S.C.A. §§ 3034(d)(1), 3241(b)(1).
- ⁵ 38 U.S.C.A. §§ 3034(d)(2), 3241(b)(2).
- ⁶ 38 U.S.C.A. §§ 3034(d)(3), 3241(b)(3).
As to payment to eligible veterans for such courses, see [§ 151](#).

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X. Educational Assistance


A. Assistance to Veterans of United States Armed Forces

3. Selection of, and Enrollment in, Program of Education

§ 150. Change of program

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

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Each eligible veteran generally may make not more than one change of program of education, but an eligible veteran whose program has been interrupted or discontinued due to the veteran's own misconduct or neglect, or lack of application, is not entitled to any such change.¹ However, despite this rule, the Secretary of Veterans Affairs, in accordance with procedures that he or she may establish, may approve a change in program other than that specified or authorized (or an initial change in the case of a veteran not eligible to make a change) if the Secretary finds that: (1) the program of education which the eligible veteran proposes to pursue is suitable to the veteran's aptitudes, interests, and abilities;² and (2) in any instance where the eligible veteran has interrupted, or failed to progress in, the veteran's program due to the veteran's own misconduct, the veteran's own neglect, or the veteran's own lack of application, there exists a reasonable likelihood with respect to the program which the eligible veteran proposes to pursue that there will not be a recurrence of such an interruption or failure to progress.³ The Secretary may also approve additional changes in program if the Secretary finds such changes are necessitated by circumstances beyond the control of the eligible veteran.⁴

Reminder:

The above provisions are applicable to the All-Volunteer Force Educational Assistance Program and the Post-9/11 Educational Assistance program.⁵



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Footnotes

- 1 38 U.S.C.A. § 3691(a).
- 2 38 U.S.C.A. § 3691(b)(1).
- 3 38 U.S.C.A. § 3691(b)(2).
- 4 38 U.S.C.A. § 3691(c).
- 5 § 138.

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X. Educational Assistance


A. Assistance to Veterans of United States Armed Forces

4. Payment of Assistance; Discontinuance

§ 151. Payment to eligible veterans; amount of payment

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  105

Under the All-Volunteer Force Educational Assistance Program,¹ the Secretary of Veterans Affairs must pay to each individual entitled to basic educational assistance who is pursuing an approved program of education a basic educational assistance allowance to help him or her meet, in part, the expenses of such individual's subsistence, tuition, fees, supplies, books, equipment, and other educational costs.² Advance payments of initial educational assistance or subsistence allowances may be authorized under specified circumstances.³

The amount to be paid for educational assistance is specified by statute⁴ and is affected by such factors as whether an approved program of education is pursued on a full-time or less than full-time basis,⁵ the length of service,⁶ the particular skill or specialty of the veteran,⁷ and entitlement under statutes previously applicable to educational benefits of veterans and which authorized greater benefits.⁸

Provision is also made by statute as to the amount of the monthly educational assistance allowance payable to an individual pursuing a full-time program of apprenticeship or other on-the-job training;⁹ the amount of the educational assistance allowance payable to an individual who enters into an agreement to pursue, and is pursuing, a program of education exclusively by correspondence;¹⁰ and the amount payable to an individual who is pursuing a program of education consisting exclusively of flight training approved as meeting the specified statutory requirements.¹¹ A work-study allowance may also be paid to veterans under certain circumstances.¹²

Observation:

The statutes governing the Post-Vietnam Era Veterans Educational Assistance Program also contain provisions pertaining to apprenticeship or other on-job training.¹³

Specific provision is made by statute as to the amount of supplemental educational assistance to be paid¹⁴ to persons eligible therefor¹⁵ and the payment of such assistance.¹⁶

A statute also bars the duplication of educational assistance benefits to veterans under specified statutory provisions.¹⁷

The Secretary may suspend, terminate, reduce, or make a final denial of any financial assistance or payment under an educational assistance program provided for under specified provisions applicable to veterans, in the case of any individual, or take other adverse action against such individual, based on information produced by a matching program with the Department of Defense.¹⁸ Overpayments made to veterans for educational assistance may be recovered under certain circumstances.¹⁹

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Footnotes

- 1 38 U.S.C.A. §§ 3001 to 3035.
- 2 38 U.S.C.A. § 3014(a).
- 3 38 U.S.C.A. § 3680(d), made applicable to the All-Volunteer Force Educational Assistance Program as discussed in § 138.
- 4 38 U.S.C.A. § 3015.
- 5 38 U.S.C.A. § 3015(a), (b).
- 6 38 U.S.C.A. § 3015(b).
- 7 38 U.S.C.A. § 3015(d).
- 8 38 U.S.C.A. § 3015(e).
- 9 38 U.S.C.A. § 3032(c).
- 10 38 U.S.C.A. § 3032(d).
- 11 38 U.S.C.A. § 3032(e).
- 12 38 U.S.C.A. § 3485, made applicable to the All-Volunteer Force Educational Assistance Program as discussed in § 138.
- 13 38 U.S.C.A. § 3233.
- 14 38 U.S.C.A. § 3022.
- 15 § 140.
- 16 38 U.S.C.A. § 3023.
- 17 38 U.S.C.A. § 3033.
- 18 38 U.S.C.A. § 3684A(a), made applicable to the All-Volunteer Force Educational Assistance Program as discussed in § 138.

19 [38 U.S.C.A. § 3685](#), made applicable to the All-Volunteer Force Educational Assistance Program as discussed in [§ 138](#).

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X. Educational Assistance

A. Assistance to Veterans of United States Armed Forces

4. Payment of Assistance; Discontinuance

§ 152. Payment to eligible veterans; amount of payment—Post-9/11 educational assistance

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  105

Under the governing statute, the Secretary of Veterans Affairs must pay to each individual entitled to post-9/11 educational assistance who is pursuing an approved program of education certain specified amounts to meet the expenses of such individual's subsistence, tuition, fees, and other educational costs for pursuit of such program of education.¹ A program of education is an approved program of education for purposes of post-9/11 educational assistance if the program of education is approved for purposes of the All-Volunteer Force Educational Assistance Program (including approval by the state approving agency concerned).² Under specified circumstances, advance payments of initial educational assistance or subsistence allowances may be authorized,³ and a work-study allowance may also be paid to veterans.⁴

The duplication of educational assistance benefits to individuals entitled to the post-9/11 educational assistance is prohibited as provided by statute.⁵

The Secretary may suspend, terminate, reduce, or make a final denial of any financial assistance or payment under an educational assistance program, in the case of any individual, or take other adverse action against such individual, based on information produced by a matching program with the Department of Defense.⁶ Overpayments made to veterans for educational assistance may be recovered under certain circumstances.⁷

CUMULATIVE SUPPLEMENT

Statutes:

[38 U.S.C.A. § 3485\(f\)](#), as added by the Student Veteran Coronavirus Response Act effective between the period beginning on March 1, 2020, and ending on December 21, 2020, provides that the Secretary of Veterans Affairs may continue to pay work-study allowance under this section or make deductions during the period of the COVID-19 emergency situation, notwithstanding the inability of the individual to perform such work-study activities by reason of such emergency situation.

[END OF SUPPLEMENT]

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Footnotes

- 1 [38 U.S.C.A. § 3313\(a\)](#).
- 2 [38 U.S.C.A. § 3313\(b\)](#).
- 3 [38 U.S.C.A. § 3680\(d\)](#), made applicable to post-9/11 educational assistance as discussed in [§ 138](#).
- 4 [38 U.S.C.A. § 3485](#), made applicable to post-9/11 educational assistance as discussed in [§ 138](#).
- 5 [38 U.S.C.A. § 3322](#).
- 6 [38 U.S.C.A. § 3684A\(a\)](#), made applicable to post-9/11 educational assistance as discussed in [§ 138](#).
- 7 [38 U.S.C.A. § 3685](#), made applicable to post-9/11 educational assistance as discussed in [§ 138](#).

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X. Educational Assistance

A. Assistance to Veterans of United States Armed Forces

4. Payment of Assistance; Discontinuance

§ 153. Discontinuance of assistance for unsatisfactory conduct or progress

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West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  105

The Secretary of Veterans Affairs must discontinue the educational assistance allowance of an eligible veteran if, at any time, the Secretary finds that according to the regularly prescribed standards and practices of the educational institution, the veteran's attendance, conduct, or progress is unsatisfactory.¹ The Secretary may renew the payment of the educational assistance allowance only if the Secretary finds that the veteran will be resuming enrollment at the same educational institution, in the same program of education, and the educational institution has both approved such veteran's reenrollment and has certified it to the Department of Veterans Affairs,² or in the case of a proposed change of either educational institution or program of education by the veteran, the cause of the unsatisfactory attendance, conduct, or progress has been removed,³ the program proposed to be pursued is suitable to the veteran's aptitudes, interests, and abilities,⁴ and if a proposed change of program is involved, the change meets the requirements for approval under a specified statute.⁵

Reminder:

The above provisions are applicable to the All-Volunteer Force Educational Assistance Program and the Post-9/11 Educational Assistance program.⁶



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Footnotes

- 1 38 U.S.C.A. § 3474.
- 2 38 U.S.C.A. § 3474(1).
- 3 38 U.S.C.A. § 3474(2)(A).
- 4 38 U.S.C.A. § 3474(2)(B).
- 5 38 U.S.C.A. § 3474(2)(C) (referring to requirements under 38 U.S.C.A. § 3691).
- 6 § 138.

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B. Assistance to Other Persons

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X. Educational Assistance

B. Assistance to Other Persons

§ 154. Spouses, surviving spouses, and children of veterans of United States Armed Forces

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  105

Specific provision is made by statute with regard to educational assistance to survivors and dependents of veterans.¹ These particular benefits, under these provisions, are not applicable to veterans themselves, only their survivors and dependents.²

Each eligible person is, subject to the applicable statutory provisions,³ entitled to receive educational assistance.⁴ The term "eligible person," for this purpose, means—

- a child⁵ of a person who: (1) died of a service connected disability;⁶ or (2) has a total disability permanent in nature resulting from a service connected disability, or who died while a disability so evaluated was in existence.⁷
- the surviving spouse of any person who died of a service connected disability sustained during a period of qualifying service.⁸
- the spouse or child of any member of the Armed Forces serving on active duty who, at the time of application for benefits under the applicable provisions, is listed by the Secretary concerned as missing in action, captured in line of duty by hostile force, or forcibly detained or interned in line of duty by a foreign government or power, for a total of more than 90 days.⁹
- the spouse of any person who has a total disability permanent in nature resulting from a service connected disability, or the surviving spouse of a veteran who died while a disability so evaluated was in existence.¹⁰
- the spouse or child of a person who: (1) the Secretary determines has a total disability permanent in nature incurred or aggravated in the line of duty in the active military, naval, or air service; (2) at the time of the Secretary's determination is

a member of the Armed Forces who is hospitalized or receiving outpatient medical care, services, or treatment; and (3) is likely to be discharged or released from such service for such disability.¹¹

Observation:

A person can be considered an eligible person separately under both the mother's and the father's service status for purposes of receiving Dependents' Educational Assistance benefits, thus permitting the combination of the mother's and the father's benefits in some fashion.¹²

Provision is specifically made as to the duration of educational assistance of eligible persons;¹³ periods of eligibility;¹⁴ assistance application requirements;¹⁵ the manner of processing applications;¹⁶ educational assistance allowances authorized to eligible persons;¹⁷ the manner of computing such allowances;¹⁸ special assistance for the educationally disadvantaged;¹⁹ the availability of assistance and payments to eligible persons for apprenticeship programs or other on-the-job training²⁰ and to eligible spouses or surviving spouses of programs of education exclusively by correspondence;²¹ the requirement, to receive benefits, of approval of the course of education;²² the approval of specialized vocational training courses;²³ payments of work-study allowances;²⁴ and entitlement to,²⁵ allowances for,²⁶ and agreements for,²⁷ special restorative training, to overcome, or lessen, the effects of a manifest physical or mental disability which would handicap an eligible person in the pursuit of a program of education.²⁸

Observation:

A veteran's widow who lived with and openly held herself out in public to be the spouse of another man since the death of her veteran husband was not eligible for surviving spouse benefits, notwithstanding that there was a legal impediment to a legally valid marriage between them because the man was married to another woman.²⁹

CUMULATIVE SUPPLEMENT

Statutes:

38 U.S.C.A. § 3501(a), as amended effective January 1, 2021, struck out " or air service" and inserted "air, or space service."

[END OF SUPPLEMENT]

Footnotes

- 1 38 U.S.C.A. §§ 3500 to 3566.
- 2 *Caravella v. Principi*, 86 Fed. Appx. 423 (Fed. Cir. 2004) (a veteran failed to establish that he was entitled to benefits under this chapter where he gave no indication of how the chapter applied to his claim which was not a claim for survivors' and dependents' educational assistance).
- 3 38 U.S.C.A. §§ 3500 to 3566.
- 4 38 U.S.C.A. § 3510.
- 5 38 U.S.C.A. § 3501(a)(2) defines the term "child" as including individuals who are married and individuals who are above the age of 23 years.
- 6 38 U.S.C.A. § 3501(a)(1)(A)(i).
- 7 38 U.S.C.A. § 3501(a)(1)(A)(ii).
- 8 38 U.S.C.A. § 3501(a)(1)(B).
- 9 38 U.S.C.A. § 3501(a)(1)(C).
- 10 38 U.S.C.A. § 3501(a)(1)(D).
A veteran's wife became an "eligible person," thus triggering the 10-year eligibility period for dependents' education assistance benefits, when she married a veteran who had a total disability permanent in nature resulting from a service connected disability sustained during a period of qualifying service. *Cypert v. Peake*, 22 Vet. App. 307 (2008).
- 11 38 U.S.C.A. § 3501(a)(1)(E).
- 12 *Osman v. Peake*, 22 Vet. App. 252 (2008).
- 13 38 U.S.C.A. § 3511.
- 14 38 U.S.C.A. § 3512.
- 15 38 U.S.C.A. § 3513.
- 16 38 U.S.C.A. § 3514.
- 17 38 U.S.C.A. § 3531.
- 18 38 U.S.C.A. § 3532.
- 19 38 U.S.C.A. § 3533.
- 20 38 U.S.C.A. § 3534(a).
- 21 38 U.S.C.A. § 3534(b).
- 22 38 U.S.C.A. § 3535.
- 23 38 U.S.C.A. § 3536.
- 24 38 U.S.C.A. § 3537.
- 25 38 U.S.C.A. § 3541.
- 26 38 U.S.C.A. § 3542.
- 27 38 U.S.C.A. § 3543.
- 28 38 U.S.C.A. § 3540.
- 29 *Dela Cruz v. Principi*, 15 Vet. App. 143 (2001).

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X. Educational Assistance

B. Assistance to Other Persons

§ 155. Veterans of allied forces

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West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  105

Provision is made by statute for the Secretary of Veterans Affairs, upon request of the proper officials of the government of any nation allied or associated with the United States in World War I (except any nation which was an enemy of the United States during World War II) or in World War II, to furnish to discharged members of the armed forces of such government, under agreements requiring reimbursement in cash of expenses so incurred, at such rates and under such regulations as the Secretary prescribes, education benefits authorized by the laws of such nation for its veterans and services required in extending such benefits.¹

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Footnotes

¹ [38 U.S.C.A. § 109.](#)

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XI. Other Benefits and Preferences

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XI. Other Benefits and Preferences

§ 156. Burial and funeral benefits; costs of transporting remains

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  102.1, 125

Forms

Forms relating to veteran burial or funeral benefits, generally, see Federal Procedural Forms, Veterans and Veterans Laws[[Westlaw®\(r\) Search Query](#)]

Federal statutes provide for discretionary payment to the person the Secretary of Veterans Affairs prescribes of a sum not exceeding a statutorily specified amount to cover burial and funeral expenses of a deceased veteran and the expense of preparing the body and transporting it to the place of burial.¹ Such payment may be made as to a deceased veteran (1) who at the time of death was in receipt of compensation (or but for the receipt of retirement pay would have been entitled to compensation) or was in receipt of pension;² or (2) with respect to whom the Secretary determines that there is no next of kin or other person claiming the body of the deceased veteran and that there are not available sufficient resources to cover burial and funeral expenses.³

A widow's claim for burial benefits was properly denied since the deceased was a member of the Philippine Scouts which do not qualify for veterans' benefits.⁴

The widow of a veteran who died as a result of a service connected disability was not entitled to reimbursement beyond the specified burial allowance for the expense of transporting the veteran's body for burial where the veteran was not buried in a national cemetery.⁵

Generally, no deduction may be made from the burial allowance because of the veteran's net assets at the time of the death of such veteran or because of any contribution from any source toward the burial and funeral expenses (including transportation) unless the amount of expenses incurred is covered by the amount actually paid therefor by the United States, a state, any agency or political subdivision of the United States or of a state, or the employer of the deceased veteran.⁶ No claim may be allowed (1) for more than the difference between the entire amount of the expenses incurred and the amount paid by any or all of the foregoing or (2) when the burial allowance would revert to the funds of a public or private organization or would discharge such an organization's obligation without payment.⁷ The burial allowance or any part thereof may not be paid in any case where specific provision is otherwise made for payment of expenses of funeral, transportation, and interment under any other statutes.⁸

When a veteran dies in a Department of Veterans Affairs facility, as defined by statute,⁹ the Secretary must pay the actual cost, not to exceed a specified sum, of the burial and funeral or, within such limits, may make contracts for such services without regard to the laws requiring advertisement for proposals for supplies and services for the Department¹⁰ and, when such a death occurs in a state, transport the body to the place of burial in the same or any other state.¹¹

CUMULATIVE SUPPLEMENT

Statutes:

[38 U.S.C.A. § 2302](#) will be stricken after January 5, 2023.

[38 U.S.C.A. § 2302\(b\)](#) will be redesignated as [38 U.S.C.A. § 2303\(d\)](#), effective January 5, 2023.

[38 U.S.C.A. § 2303](#) will be amended to pertain to veterans whose deaths occur from non-service-connected disability effective January 5, 2023. Such veterans will be defined as deceased veterans who are not covered by [38 U.S.C.A. § 2307](#) and who meets any of the following criteria: (A) The deceased veteran dies in (i) a facility of the Department (as defined in [38 U.S.C.A. § 1701\(3\)](#)) to which the deceased veteran was properly admitted for hospital, nursing home, or domiciliary care under [38 U.S.C.A. § 1710](#) or [38 U.S.C.A. § 1711\(a\)](#); or (ii) an institution at which the deceased veteran was, at the time of death, receiving (I) hospital care in accordance with [38 U.S.C.A. §§ 1703A, 8111, 8153](#); (II) nursing home care under [38 U.S.C.A. § 1720](#); or (III) nursing home care for which payments are made under [38 U.S.C.A. § 1741](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 [38 U.S.C.A. § 2302\(a\)](#).
Burial benefits are also provided for by federal regulation. [38 C.F.R. §§ 3.1700](#) to [3.1713](#).
- 2 [38 U.S.C.A. § 2302\(a\)\(1\)](#).
The daughter of a deceased veteran failed to demonstrate prejudicial error in a decision by the Board of Veterans Appeals, denying non-service-connected burial benefits, under the statute allowing payment of such benefits to a veteran who died as a result of a non-service-connected disability and at the time of death was in receipt of compensation or a pension, since the veteran died from a non-service-connected disability but was not in receipt of compensation or a pension at the time of his death, and jurisdiction was lacking to address the daughter's claim that the Department of Veterans Affairs was prohibited from assigning the veteran a 0% disability rating for his service-connected inguinal hernia. [Wingard v. McDonald, 27 Vet. App. 329 \(2015\)](#).
- 3 [38 U.S.C.A. § 2302\(a\)\(2\)](#).

A veteran's surviving spouse was not entitled to a burial allowance and the recoupment of transportation costs where it was undisputed that the veteran was not in receipt of any compensation or pension benefits from the Veterans Administration at the time of his or her death. [Melson v. Derwinski](#), 1 Vet. App. 334 (1991).

A veteran who was not receiving any monthly payment at the time of his or her death was not in receipt of compensation for purposes of qualifying for the burial allowance. [Osborne v. Principi](#), 3 Vet. App. 368 (1992).

4 [Elarde v. Derwinski](#), 1 Vet. App. 562 (1991).

5 [Turner v. Gober](#), 14 Vet. App. 224 (2000).

As to burial in national cemeteries, generally, see § 157.

6 38 U.S.C.A. § 2302(b).

7 38 U.S.C.A. § 2302(b).

8 38 U.S.C.A. § 2302(b).

9 38 U.S.C.A. § 2303(a)(2).

10 38 U.S.C.A. § 2303(a)(1)(A).

11 38 U.S.C.A. § 2303(a)(1)(B).

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XI. Other Benefits and Preferences

§ 157. National cemeteries and memorials; persons eligible for interment

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West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  102.1, 125

Under federal statutes pertaining to national cemeteries and memorials,¹ a National Cemetery Administration has been provided for within the Department of Veterans for the interment of deceased service members and veterans,² consisting of cemeteries, memorials, and monuments.³

Under such regulations as the Secretary of Veterans Affairs may prescribe, and subject to a provision requiring forfeiture of benefits for certain subversive activities,⁴ persons whose remains may be buried in any open national cemetery in the National Cemetery Administration include—

- any veteran (which, for this purpose, includes a person who died in the active military, naval, or air service).⁵
- any citizen of the United States who, during any war in which the United States is or has been engaged, served in the armed forces of any government allied with the United States during that war, and whose last such service terminated honorably.⁶
- any member of a Reserve component of the Armed Forces, any member of the Army National Guard or the Air National Guard, and any member of the Reserve Officers' Training Corps of the Army, Navy, or Air Force whose death occurs under honorable conditions and satisfies additional statutory requirements.⁷
- the spouse, surviving spouse (which, for this purpose, includes a surviving spouse who had a subsequent remarriage which was terminated by death or divorce), minor child (which includes a child under 21 years of age, or under 23 years of age if pursuing a course of instruction at an approved educational institution), and, in the discretion of the Secretary, unmarried adult child, of any of the persons whose burial in the national cemetery is authorized by specific provisions.⁸

— the parent of any veteran who is a hostile casualty or died from a training-related injury; who is interred in a national cemetery; and who, at the time of the person's parent's death, did not have a spouse, surviving spouse, or child who is buried or who, upon death, may be eligible for burial in a national cemetery as a surviving spouse, provided the Secretary determines that there is available space at the gravesite where such veteran is interred.⁹

— any person who at the time of death was entitled to retired pay under provisions for such pay for nonregular service, or would have been entitled to retired pay under those provisions, but for the fact that the person was under 60 years of age.¹⁰

— any individual whose service is described in designated provisions pertaining to certain service deemed not to be active service¹¹ if such individual at the time of death was a citizen of the United States or an alien lawfully admitted for permanent residence in the United States, and resided in the United States.¹²

— such other persons or classes of persons as may be designated by the Secretary.¹³

With specified exceptions, each grave in a national cemetery must be marked with an appropriate marker, which must bear the name of the person buried, the number of the grave, and such other information as the Secretary of Veterans Affairs by regulation prescribes.¹⁴

Provision is also made by statute requiring the Secretary of the Army to designate an area of appropriate size within Arlington National Cemetery for the unmarked interment, in accordance with such regulations as the Secretary may prescribe, of the ashes of persons eligible for interment in such cemetery whose remains were cremated.¹⁵

Statutes also specifically provide as to the disposition of inactive cemeteries, burial plots, memorials, or monuments;¹⁶ the acquisition of lands for national cemeteries;¹⁷ the authority of the Secretary of Veterans Affairs to accept gifts, devise, or bequests, and maintain suitable memorials;¹⁸ and the Secretary's authority to make grants to states to assist such states in establishing, expanding, or improving state-owned veterans' cemeteries.¹⁹

CUMULATIVE SUPPLEMENT

Statutes:

[38 U.S.C.A. § 2402\(a\)\(1\)](#), as amended effective January 1, 2021, struck out " or air service" and inserted "air, or space service."

[38 U.S.C.A. § 2402\(a\)\(5\)](#), as amended effective December 31, 2019, provides: the spouse, surviving spouse (which for purposes of this chapter includes a surviving spouse who had a subsequent remarriage), minor child (which for purposes of this chapter includes a child under 21 years of age, or under 23 years of age if pursuing a course of instruction at an approved educational institution), and, in the discretion of the Secretary of Veterans' Affairs, unmarried adult child of any of the persons listed in paragraphs (1) through (4) and paragraph (7), and the spouse, minor child, and, in the discretion of the Secretary, unmarried adult child of a member of the Armed Forces serving on active duty under conditions other than dishonorable, as shown by a statement from a general court-martial convening authority, at the time of the spouse's or child's death if such death occurs before October 1, 2024.

[38 U.S.C.A. § 2402\(a\)\(10\)](#), as added effective March 23, 2018, provides that persons whose remains may be buried in any open national cemetery in the National Cemetery Administration include any individual who was naturalized pursuant to the Hmong Veterans' Naturalization Act of 2000, and who at the time of the individual's death resided in the United States.

38 U.S.C.A. § 2408(a) will be amended effective January 5, 2023, to provide, in pertinent part, that, subject to specified conditions, the Secretary of Veterans Affairs may make grants to any state or county to assist in the establishment, expansion, or improvement of veterans' cemeteries owned by the state or county and in the operation and maintenance of such a cemetery.

38 U.S.C.A. § 2408(g) to be added effective January 5, 2023, provides: (1) The Secretary of Veterans Affairs may make a grant to a county under this section only if: (A)(i) the state in which the county is located does not have a veterans' cemetery owned by the state; (ii) the state is not in receipt of a grant under this section for the construction of a new veterans' cemetery to be owned by the state; (iii) the state did not apply for a grant under this section during the previous year; (iv) no tribal organization from the state in which the county is located has a veterans' cemetery on trust land owned by, or held in trust for, the tribal organization; (v) no such tribal organization is in receipt of a grant under this section for the construction of a new veterans' cemetery to be located on such land; and (vi) no such tribal organization applied for a grant under this section during the previous year; and (B) the county demonstrates in the application under 38 U.S.C.A. § 2408(a)(2), to the satisfaction of the Secretary, that the county has the resources necessary to operate and maintain the veterans' cemetery owned by the county.

[END OF SUPPLEMENT]

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Footnotes

- 1 38 U.S.C.A. §§ 2400 to 2414.
- 2 38 U.S.C.A. § 2400(a).
- 3 38 U.S.C.A. § 2400(b).
- 4 38 U.S.C.A. § 6105.
- 5 38 U.S.C.A. § 2402(a)(1).
- 6 38 U.S.C.A. § 2402(a)(4).
- 7 38 U.S.C.A. § 2402(a)(2), (3).
- 8 38 U.S.C.A. § 2402(a)(5).
- 9 38 U.S.C.A. § 2402(a)(9).
- 10 38 U.S.C.A. § 2402(a)(7).
- 11 38 U.S.C.A. § 107(a), (b), pertaining to service before July 1, 1946, in the organized military forces of the Government of the Commonwealth of the Philippine and service in the Philippine Scouts under section 14 of the Armed Forces Voluntary Recruitment Act of 1945.
- 12 38 U.S.C.A. § 2402(a)(8).
- 13 38 U.S.C.A. § 2402(a)(6).
- 14 38 U.S.C.A. § 2404(c)(1).
- 15 38 U.S.C.A. § 2410(a).
- 16 38 U.S.C.A. § 2405.
- 17 38 U.S.C.A. § 2406.
- 18 38 U.S.C.A. § 2407.
- 19 38 U.S.C.A. § 2408(a).

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XI. Other Benefits and Preferences

§ 158. Housing; homestead entry

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West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  [102.1](#), [108.1](#)

A federal statute provides that preference or priority of opportunity in the occupancy of the mortgaged property for veterans of World War II and their immediate families and for hardship cases as defined by the Secretary of Housing and Urban Development must be provided under such regulations and procedures prescribed by the Secretary.¹

Another federal statute makes provision regarding financial assistance for supportive services for very low-income veteran families in permanent housing.²

When the Secretary of Housing and Urban Development determines that any housing provided under statutes pertaining to the public health and welfare is no longer required for persons engaged in national defense activities, preference in admission to occupancy thereof must be given to veterans pending its ultimate sale or disposition, and as among veterans, preference in admission to occupancy must be given to disabled veterans whose disability has been determined by the Secretary of Veterans Affairs to be service connected.³

A person disabled by Veterans Administration medical or surgical treatment is eligible for specially adapted housing benefits in the same manner as if his or her disability were service connected.⁴

Statutory provisions govern the disposal of veterans' housing.⁵

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Footnotes

¹ 12 U.S.C.A. § 1746(c).

² 38 U.S.C.A. § 2044.

38 U.S.C.A. § 2044 is implemented by 38 C.F.R. Pt. 62.

3 42 U.S.C.A. § 1592a(c).

4 Kilpatrick v. Principi, 327 F.3d 1375 (Fed. Cir. 2003).

5 42 U.S.C.A. §§ 1581 to 1590.

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§ 159. Other preferences and benefits

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West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  102.1, 108.1

There are special provisions regarding the naturalization of a person who has served honorably in the Armed Forces of the United States for one year and who files for naturalization within six months after the termination of such service.¹

The elimination of a state statutory exemption for disabled veterans from a city's regulation of street peddling is valid.²

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Footnotes

¹ [Am. Jur. 2d, Aliens and Citizens § 2369.](#)

² [Story v. Green, 978 F.2d 60 \(2d Cir. 1992\)](#) (the veterans failed to allege a property interest that could support their due process and takings claims; the statute involved, which merely regulated a right to sell, neither impinged on fundamental rights nor used a classification based on a suspect criterion; the local government had a legitimate interest in preserving the appearance of its streets, and the government's economic regulation of street peddlers was rationally related to that interest).

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§ 160. Veterans' organizations, generally

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West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  101

Numerous organizations pertaining to veterans have been incorporated by Congress, with specified memberships, purposes, powers, and limitations, including—

- the American Legion.¹
- the Veterans of Foreign Wars of the United States.²
- Veterans of World War I of the United States of America, Inc.³
- the Korean War Veterans Association, Inc.⁴
- Vietnam Veterans of America, Inc.⁵
- Amvets (American Veterans).⁶
- the United States Submarine Veterans of World War II.⁷
- American Ex-Prisoners of War.⁸
- the Disabled American Veterans.⁹
- Paralyzed Veterans of America.¹⁰
- Blinded Veterans Association.¹¹

— the Jewish War Veterans, USA, National Memorial, Inc.¹²

— the Jewish War Veterans of the United States of America, Inc.¹³

— Italian American War Veterans of the United States.¹⁴

— the Polish Legion of American Veterans, USA.¹⁵

— the 369th Veterans Association.¹⁶

— the Women's Army Corps Veterans Association.¹⁷

Provision is made by federal statute with regard to audits of federally chartered corporations, including specific veterans' organizations.¹⁸

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Footnotes

- | | |
|----|--|
| 1 | § 161. |
| 2 | 36 U.S.C.A. §§ 230101 to 230107.
As to the Veterans of Foreign Wars of the United States, generally, see § 162. |
| 3 | 36 U.S.C.A. §§ 230301 to 230313. |
| 4 | 36 U.S.C.A. §§ 120101 to 120112. |
| 5 | 36 U.S.C.A. §§ 230501 to 230513. |
| 6 | 36 U.S.C.A. §§ 22701 to 22712. |
| 7 | 36 U.S.C.A. §§ 220701 to 220712. |
| 8 | 36 U.S.C.A. §§ 20901 to 20913. |
| 9 | 36 U.S.C.A. §§ 50301 to 50308. |
| 10 | 36 U.S.C.A. §§ 170101 to 170111. |
| 11 | 36 U.S.C.A. §§ 30301 to 30312. |
| 12 | 36 U.S.C.A. §§ 110301 to 110310. |
| 13 | 36 U.S.C.A. §§ 110101 to 110112. |
| 14 | 36 U.S.C.A. §§ 100101 to 100112. |
| 15 | 36 U.S.C.A. §§ 170501 to 170512. |
| 16 | 36 U.S.C.A. §§ 210301 to 210313. |
| 17 | 36 U.S.C.A. §§ 240101 to 240112. |
| 18 | 36 U.S.C.A. § 10101. |

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§ 161. American Legion

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West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  101

Specific federal statutory provisions establish as a corporation the American Legion,¹ specify the nonpolitical nature of such corporation,² and, among other things, define the purposes,³ powers,⁴ and membership⁵ of the Legion. No person may be a member of the corporation unless such person has served in the Armed Forces of the United States or of a government associated with the United States during specified periods.⁶ Such person also must have had an honorable discharge or separation from such service or must continue to serve honorably after any of the specified ending dates.⁷

Observation:

The fact that the American Legion was incorporated by an act of Congress and under that act only those serving in the Armed Forces during designated periods of time are eligible for membership does not take the Legion out of the field of the principles controlling membership questions of voluntary organizations generally.⁸

The provisions of the federal law which, in prescribing eligibility to membership in the American Legion, limit membership to those who served in the Armed Forces of the United States between certain designated periods⁹ do not make membership in the Legion an absolute right of persons eligible, and in view of the further fact that the Legion's national constitution provides an additional restriction upon eligibility by disqualifying "conscientious objectors" and those dishonorably discharged and leaves to

each post the right to be judge of its own membership, subject to restrictions of the constitution and bylaws, right to membership in the Legion cannot be considered to be an absolute right.¹⁰ The respective posts have authority to refuse an application for membership without assigning a reason therefor.¹¹ The restraints imposed by the Fourteenth Amendment upon the abridgment of privileges and immunities of citizens does not operate to limit the right of the Legion to refuse either membership or a charter to applicants; that restraint is a restraint upon state action only.¹²

The American Legion, while a citizen of the United States,¹³ is not a citizen of any state for jurisdictional purposes.¹⁴ But establishing a post in a particular state constitutes "doing business" by the American Legion within that state and thus subjects it to the jurisdiction of the courts of that state.¹⁵ However, the courts have no power to compel the establishment of an additional post of the American Legion.¹⁶ A federal court does not have jurisdiction of an action involving revocation of the charter of an American Legion Post merely because the Legion was incorporated under a federal statute.¹⁷

A chapter or post of the American Legion is deemed to be a corporate entity for purpose of making contracts, incurring liabilities, and acquiring rights and of suing and being sued in courts of the state in its own name.¹⁸

CUMULATIVE SUPPLEMENT

Statutes:

[36 U.S.C.A. § 21704A](#), as added effective July 25, 2019, provides that the requirements for holding a staff position in the American Legion corporation may not discriminate on the basis of race, color, religion, sex, or national origin.

[END OF SUPPLEMENT]

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Footnotes

- 1 [36 U.S.C.A. § 21701.](#)
- 2 [36 U.S.C.A. § 21706.](#)
- 3 [36 U.S.C.A. § 21702.](#)
- 4 [36 U.S.C.A. § 21704.](#)
- 5 [36 U.S.C.A. § 21703.](#)
- 6 [36 U.S.C.A. § 21703\(1\).](#)
- 7 [36 U.S.C.A. § 21703\(2\).](#)
- 8 [Chapman v. American Legion](#), 244 Ala. 553, 14 So. 2d 225, 147 A.L.R. 585 (1943).
- 9 [36 U.S.C.A. § 21703.](#)
- 10 [Chapman v. American Legion](#), 244 Ala. 553, 14 So. 2d 225, 147 A.L.R. 585 (1943).
- 11 [Chapman v. American Legion](#), 244 Ala. 553, 14 So. 2d 225, 147 A.L.R. 585 (1943).
The provision of its enabling statute in no way limits the inherent power of the American Legion to adopt additional criteria of eligibility having a reasonable relation to its statutory purpose and not contrary to public policy. [Reiter v. American Legion](#), 189 Misc. 1053, 72 N.Y.S.2d 345 (Sup 1947), order aff'd, 273 A.D. 757, 75 N.Y.S.2d 530 (1st Dep't 1947).
- 12 [Chapman v. American Legion](#), 244 Ala. 553, 14 So. 2d 225, 147 A.L.R. 585 (1943).
- 13 [Harris v. American Legion](#), 162 F. Supp. 700 (S.D. Ind. 1958), judgment aff'd, 261 F.2d 594, 1 Fed. R. Serv. 2d 194 (7th Cir. 1958).

- 14 [Harris v. American Legion](#), 162 F. Supp. 700 (S.D. Ind. 1958), judgment [aff'd](#), 261 F.2d 594, 1 Fed. R. Serv. 2d 194 (7th Cir. 1958).
- 15 [Gallaher v. American Legion](#), 154 Misc. 281, 277 N.Y.S. 81 (Sup 1934), [aff'd](#), 242 A.D. 604, 271 N.Y.S. 1012 (1st Dep't 1934).
- 16 [Chapman v. American Legion](#), 244 Ala. 553, 14 So. 2d 225, 147 A.L.R. 585 (1943).
- 17 [Anthony Wayne Post No 418 v. American Legion](#), 5 F. Supp. 395 (E.D. Pa. 1933).
- 18 [D'Amore v. American Legion](#), Amity Post No. 791, 27 Misc. 2d 937, 214 N.Y.S.2d 70 (Sup 1961).

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§ 162. Veterans of Foreign Wars of the United States

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West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  101

Federal statutes created the "Veterans of Foreign Wars of the United States,"¹ as a corporation,² and detail, among other things, the purposes of such corporation³ and the corporation's powers⁴ and define the corporate membership.⁵

Nothing in the federal statutes governing the Veterans of Foreign Wars proscribes membership of a Veterans of Foreign Wars organization in a credit union.⁶

The provisions of a state act which exempt associations from payment of unemployment insurance if operated exclusively for educational and charitable purposes do not apply to a local Veterans of Foreign Wars Post since the Veterans of Foreign Wars organization does not operate exclusively for such purposes even though part of its activity is devoted to such purposes.⁷ A state legislature has no constitutional authority to appropriate public funds of the state to the Veterans of Foreign Wars, or to be expended by and through it, in aid of the carrying out of its functions or some part of them because such an appropriation would be in the nature of a gift of public funds within the meaning of the state constitution.⁸

Practice Tip:

The Veterans of Foreign Wars, established as a federal corporation by statute, cannot be denominated as a state citizen for diversity jurisdiction purposes of the federal courts.⁹ The mere existence of a headquarters at Kansas City, Missouri does not establish that day-to-day operational decisions are taken there or that the greater part of the corporation's property and personnel is located there.¹⁰

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Footnotes

- 1 36 U.S.C.A. § 230101.
- 2 36 U.S.C.A. § 230101.
- 3 36 U.S.C.A. § 230102.
- 4 36 U.S.C.A. § 230104.
- 5 36 U.S.C.A. § 230103.
- 6 Chisholm v. State Capitol Credit Union, 278 Minn. 31, 153 N.W.2d 156 (1967).
- 7 In re Emil Hubsch Post No. 596, Veterans of Foreign Wars of U.S., 278 A.D. 460, 106 N.Y.S.2d 727 (3d Dep't 1951), order aff'd, 303 N.Y. 682, 102 N.E.2d 838 (1951).
- 8 Veterans of Foreign Wars of U.S., Department of Okl. v. Childers, 1946 OK 211, 197 Okla. 331, 171 P.2d 618 (1946).
- 9 Crum v. Veterans of Foreign Wars, 502 F. Supp. 1377 (D. Del. 1980).
- 10 Crum v. Veterans of Foreign Wars, 502 F. Supp. 1377 (D. Del. 1980).

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§ 163. Loans to and use of military material and supplies

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West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  101

The Secretary of a military department may lend certain specified items of military material and supplies to any recognized national veterans' organization for use at its national or state convention or national youth athletic or recreation tournament.¹ He or she may also permit the organization to use unoccupied barracks under the jurisdiction of that department for such an occasion.² Property lent may be delivered on terms and at times agreed upon by the Secretary, but the veterans' organization must defray any expense incurred by the United States in the delivery, return, rehabilitation, or replacement of that property,³ and the Secretary of the military department concerned must require a good and sufficient bond for the return in good condition of property lent or used under this provision.⁴

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Footnotes

- [1](#) [10 U.S.C.A. § 2551\(a\).](#)
- [2](#) [10 U.S.C.A. § 2551\(a\).](#)
- [3](#) [10 U.S.C.A. § 2551\(b\).](#)
- [4](#) [10 U.S.C.A. § 2551\(c\).](#)

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§ 164. Unlawful manufacture, reproduction, or transactions involving insignia of veterans organizations

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Any person who knowingly manufactures, reproduces, sells, or purchases for resale, either separately or on or appended to, any article of merchandise manufactured or sold, any badge, medal, emblem, or other insignia, or any colorable imitation thereof, of any veterans' organization incorporated by enactment of Congress or of any organization formally recognized by any such veterans' organization as an auxiliary of such veterans' organization is subject to a fine or imprisonment for not more than a specific number of months or both.¹ The same penalty applies to any person who knowingly prints, lithographs, engraves, or otherwise reproduces on any poster, circular, periodical, magazine, newspaper, or other publication, or circulates or distributes any such matter bearing a reproduction of such a badge, medal, emblem, or other insignia or any colorable imitation thereof, except when authorized under rules and regulations prescribed by any such organization.²

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Footnotes

- ¹ [18 U.S.C.A. § 705](#).
As to the right of veterans to wear authorized medals properly issued to them, see [§ 2](#).
- ² [18 U.S.C.A. § 705](#).

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XIII. Claims for Veterans' Benefits; Decisions; Appeal and Review

A. Claims, Applications, and Decisions of Secretary of Veterans Affairs; Payment of Claims

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77 Am. Jur. 2d Veterans and Veterans Laws § 165

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Veterans and Veterans' Laws

Karl Oakes, J.D.

XIII. Claims for Veterans' Benefits; Decisions; Appeal and Review

A. Claims, Applications, and Decisions of Secretary of Veterans Affairs; Payment of Claims

1. Claims and Applications, in General

§ 165. Claims and applications for veterans' benefits, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  130 to 134

Treatises and Practice Aids

Filing a claim, Federal Procedure, L. Ed., Veterans and Veterans Affairs[[Westlaw®\(r\): Search Query](#)]

Claim for death benefits, generally, Federal Procedure, L. Ed., Veterans and Veterans Affairs[[Westlaw®\(r\): Search Query](#)]

A specific claim in the form prescribed by the Secretary of Veterans Affairs or jointly with the Commissioner of Social Security, as prescribed by statute,¹ must be filed in order for benefits to be paid or furnished to any individual under the laws administered by the Secretary.² Upon request made by any person claiming or applying for, or expressing an intent to claim or apply for, a benefit under the laws administered by the Secretary, the Secretary must furnish such person, free of all expense, all instructions and forms necessary to apply for that benefit.³

A claim by a surviving spouse or child for compensation or dependency and indemnity compensation will also be considered to be a claim for death pension and accrued benefits, and a claim by a surviving spouse or child for death pension will be considered to be a claim for death compensation (or dependency and indemnity compensation) and accrued benefits.⁴ A claim by a parent for compensation or dependency and indemnity compensation is also considered to be a claim for accrued benefits.⁵

Applications for accrued veteran's benefits must be filed within one year after the date of the veteran's death.⁶

Observation:

Accrued-benefits claims are different from service connection claims of a veteran from whose service a former claim is derived.⁷

The timeliness of a claim under a provision for burial benefits⁸ is a threshold matter, and if such a claim is untimely, the Department of Veterans Affairs has no jurisdiction even to consider whether it is well grounded.⁹

A veteran filing an original claim for benefits and a veteran attempting to reopen his or her claim are both claimants making an "application for benefits" under a provision¹⁰ requiring the Secretary to inform a claimant of the evidence necessary for the claimant to complete an incomplete application.¹¹ When a veteran has made an application to reopen a claim and the Secretary of Veterans Affairs is on notice of evidence which may prove to be new and material but has not been submitted with the application, the Secretary has a duty to inform a claimant of the evidence that is necessary to complete the application.¹² The extent of the Secretary's obligation depends on the particular facts of the case and on the extent to which the Secretary has advised the claimant of the evidence necessary to be submitted with a veterans' benefits claim.¹³

A veteran's claims for benefits for a service connected disability contained in the statutory provisions pertaining to compensation for service connected disability or death of veterans¹⁴ dies with the veteran; a veteran's survivors may have a claim for benefits under the statutes pertaining to dependency and indemnity compensation for service connected disability or death,¹⁵ but these claims are different from those of the veteran.¹⁶

The Department of Veterans Affairs is precluded from determining a claim abandoned only when a file discloses other possible and plausible addresses; in those cases, an attempt should be made to locate him or her at the alternate address before finding abandonment of a previously adjudicated benefit.¹⁷

Observation:

Department of Veterans Affairs adjudicators involved in a case are immune from a veteran's damages claims.¹⁸ There is no private cause of action against federal officials for constitutional torts against Department of Veterans Affairs employees.¹⁹

CUMULATIVE SUPPLEMENT

Statutes:

38 U.S.C.A. § 5103(a)(3), as added effective August 23, 2017, provides that the requirement to provide notice under 38 U.S.C.A. § 5103(a)(1) does not apply with respect to a supplemental claim that is filed within the timeframe set forth in 38 U.S.C.A. § 5110(a)(2)(B), (D).

[END OF SUPPLEMENT]

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Footnotes

- 1 38 U.S.C.A. § 5105.
- 2 38 U.S.C.A. § 5101(a).
Regulations as to claims for veterans' benefits are contained in 38 C.F.R. §§ 3.150 to 3.161.
- 3 38 U.S.C.A. § 5102(a).
- 4 38 U.S.C.A. § 5101(b)(1).
- 5 38 U.S.C.A. § 5101(b)(2).
- 6 38 U.S.C.A. § 5121(c).
- 7 *Zevalkink v. Brown*, 6 Vet. App. 483 (1994), *aff'd*, 102 F.3d 1236 (Fed. Cir. 1996).
- 8 38 U.S.C.A. § 2304, requiring applications for payments to be filed within two years after the burial of the veteran.
- 9 *Thompson v. Brown*, 6 Vet. App. 436 (1994).
- 10 38 U.S.C.A. § 5103(a)(1), discussed in § 167.
- 11 *Graves v. Brown*, 8 Vet. App. 522 (1996).
- 12 *Graves v. Brown*, 8 Vet. App. 522 (1996).
As to the Secretary's duty to reopen a claim upon the presentation of new and material evidence, generally, see § 176.
- 13 *Graves v. Brown*, 8 Vet. App. 522 (1996).
- 14 38 U.S.C.A. §§ 1101 to 1163.
- 15 38 U.S.C.A. §§ 1301 to 1323.
- 16 *Vda de Landicho v. Brown*, 7 Vet. App. 42 (1994).
- 17 *Hyson v. Brown*, 5 Vet. App. 262 (1993).
- 18 *Marozsan v. U.S.*, 90 F.3d 1284 (7th Cir. 1996).
- 19 *Sugrue v. Derwinski*, 26 F.3d 8 (2d Cir. 1994); *Zuspan v. Brown*, 60 F.3d 1156, 12 A.D.D. 239 (5th Cir. 1995).

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XIII. Claims for Veterans' Benefits; Decisions; Appeal and Review

A. Claims, Applications, and Decisions of Secretary of Veterans Affairs; Payment of Claims

1. Claims and Applications, in General

§ 166. Criminal liability for false claims

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West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  130, 132

Any person who knowingly and willfully makes or presents any false, fictitious, or fraudulent affidavit, declaration, certificate, voucher, endorsement, or paper, or writing purporting to be such, concerning any claim for a pension or payment thereof, or pertaining to any other matter within the jurisdiction of the Secretary of Veterans Affairs, is subject to fine or imprisonment, or both, as specified by statute.¹ The same is true of any person knowingly or willfully making or presenting any paper required as a voucher in drawing a pension, which paper bears a date subsequent to that upon which it was actually signed or acknowledged by the pensioner, or knowingly and falsely certifies that the declarant, affiant, or witness named in such declaration, affidavit, voucher, endorsement, or other paper or writing personally appeared before him or her and was sworn thereto or acknowledged the execution thereof.²

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Footnotes

¹ 18 U.S.C.A. § 289.

² 18 U.S.C.A. § 289.

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77 Am. Jur. 2d Veterans and Veterans Laws § 167

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XIII. Claims for Veterans' Benefits; Decisions; Appeal and Review


A. Claims, Applications, and Decisions of Secretary of Veterans Affairs; Payment of Claims

1. Claims and Applications, in General

§ 167. Assistance of Secretary of Veterans Affairs regarding claim

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West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  133

Treatises and Practice Aids

Notification to claimant regarding information and evidence needed to complete application, Federal Procedure, L. Ed., Veterans and Veterans Affairs [[Westlaw®\(r\): Search Query](#)]

Assistance to claimant in obtaining evidence necessary to substantiate claim, Federal Procedure, L. Ed., Veterans and Veterans Affairs [[Westlaw®\(r\): Search Query](#)]

If the application of a person claiming veterans' benefits is incomplete, the Secretary of Veterans Affairs must notify the claimant of the evidence necessary to complete the application.¹ The Secretary must make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a law administered by the Secretary.² The purpose of this provision is to require that the Secretary provide affirmative notification to a claimant prior to the initial decision in the claimant's case.³ The claimant must be given the required information in a form which enables the claimant to understand the process, the information needed to establish the claim, and who will be responsible for obtaining that information.⁴ Such duty is not satisfied by various postdecisional communications from which a claimant might be able to infer what evidence was found lacking in the claimant's presentation.⁵ This duty applies to all claimants regardless of whether they have established veteran status.⁶ However, the duty does not apply to applicants for restoration of competency as such applicants are not seeking benefits but a decision regarding how benefits will be distributed.⁷

The Secretary's duty to assist at least encompasses responding to a claimant's request for a search of records already in the claimant's files.⁸ The Department of Veterans Affairs does not meet its statutory duty to assist a veteran when it fails to obtain a report of a private physical examination which the veteran requested the Department to procure.⁹

The duty to assist a veteran in developing the facts pertinent to his or her claim has been said to include the ordering of a medical examination¹⁰ to determine the extent of the claimant's disability.¹¹ The Secretary may satisfy the statutory duty to assist by providing a medical examination conducted by an examiner able to provide "competent medical evidence," and such an examiner need not be a physician.¹² Where the service medical records of a veteran who submits well-grounded claims for service connected disability compensation are unavailable, the duty to assist includes a thorough and contemporaneous medical examination which takes into account records of prior medical treatment.¹³ However, the failure of the Secretary to conduct a job-market or employability survey to determine whether a claimant is unemployable as a result of service connected disabilities, or to use experts to resolve the issue of unemployability, does not constitute a breach of the duty to assist where the Secretary is not required by statute or regulation to take such actions.¹⁴

CUMULATIVE SUPPLEMENT

Statutes:

38 U.S.C.A. § 5103(a)(3), as added effective August 23, 2017, provides that the requirement to provide notice under 38 U.S.C.A. § 5103(a)(1) does not apply with respect to a supplemental claim that is filed within the timeframe set forth in 38 U.S.C.A. § 5110(a)(2)(B), (D).

[END OF SUPPLEMENT]

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Footnotes

- 1 38 U.S.C.A. § 5103(a)(1).
If a claimant's application for accrued benefits is incomplete at the time it is originally submitted, the Secretary must notify the claimant of the evidence necessary to complete the application. 38 U.S.C.A. § 5121(c).
A veteran's statement that his physician told him he probably had adult-onset diabetes at the time of his discharge put the Secretary of Veterans Affairs on notice of the likely existence of competent medical evidence that, if true, would be relevant to a full and fair adjudication of the claim, and the Secretary therefore had an obligation under the statute to assist the claimant by advising him that his physician's statement was needed to "complete" his application. *Robinette v. Brown*, 8 Vet. App. 69 (1995).
- 2 38 U.S.C.A. § 5103A(a).
- 3 *Mayfield v. Nicholson*, 444 F.3d 1328 (Fed. Cir. 2006).
- 4 *Mayfield v. Nicholson*, 444 F.3d 1328 (Fed. Cir. 2006).
- 5 *Mayfield v. Nicholson*, 444 F.3d 1328 (Fed. Cir. 2006).
- 6 *Gardner v. Shinseki*, 22 Vet. App. 415 (2009).
- 7 *Sims v. Nicholson*, 19 Vet. App. 453 (2006).
- 8 *Jolley v. Derwinski*, 1 Vet. App. 37 (1990).
The Secretary failed to assist a veteran when the Department failed to acquire medical records of which it had notice. *Culver v. Derwinski*, 3 Vet. App. 292 (1992).
- 9 *Graves v. Brown*, 6 Vet. App. 166 (1994).

10 [Wamhoff v. Brown](#), 8 Vet. App. 517 (1996).

11 [Gregory v. Brown](#), 8 Vet. App. 563 (1996).

12 [Cox v. Nicholson](#), 20 Vet. App. 563 (2007), dismissed, 263 Fed. Appx. 864 (Fed. Cir. 2008).

The Secretary of Veterans Affairs fulfilled his statutory duty to assist a veteran who asserted claim for a rating of total disability based on individual unemployability by providing the veteran with a thorough and contemporaneous medical examination, which adequately discussed the effect of veteran's service connected post-traumatic stress disorder on his ability to work. [Dingess v. Nicholson](#), 19 Vet. App. 473 (2006), aff'd, 483 F.3d 1311 (Fed. Cir. 2007) and aff'd, 226 Fed. Appx. 1004 (Fed. Cir. 2007).

13 [Milostan v. Brown](#), 4 Vet. App. 250 (1993).

14 [Gary v. Brown](#), 7 Vet. App. 229 (1994).

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Veterans and Veterans' Laws

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XIII. Claims for Veterans' Benefits; Decisions; Appeal and Review

A. Claims, Applications, and Decisions of Secretary of Veterans Affairs; Payment of Claims

1. Claims and Applications, in General

§ 168. Attorneys or agents participating in preparation, presentation, or prosecution of claims

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  130

Except as otherwise provided by a particular statute dealing with appearances of representatives before agencies,¹ no individual may act as an agent or attorney in the preparation, presentation, or prosecution of any claim under the laws administered by the Secretary of Veterans Affairs unless such individual has been recognized for such purposes by the Secretary.² Under statutorily specified conditions,³ the Secretary may recognize representatives of the American National Red Cross, the American Legion, the Disabled American Veterans, the United Spanish War Veterans, the Veterans of Foreign Wars, and such other organizations as the Secretary may approve in the preparation, presentation, and prosecution of claims under laws administered by the Secretary.⁴ The Secretary may recognize any individual for the preparation, presentation, and prosecution of any particular claim for benefits under the laws administered by the Secretary if such individual has certified to the Secretary that no fee or compensation of any nature will be charged any individual for services rendered in connection with such claim,⁵ and such individual has filed with the Secretary a power of attorney, executed in such manner and in such form as the Secretary may prescribe.⁶

The Secretary may recognize any individual as an agent or attorney for the preparation, presentation, and prosecution of claims under laws administered by the Secretary.⁷

CUMULATIVE SUPPLEMENT

Statutes:

[38 U.S.C.A. § 5906](#), added effective January 1, 2021, provides that not less frequently than three times each year, the Secretary of Veterans Affairs must facilitate the provision by a qualified legal assistance clinic of pro bono legal assistance to eligible individuals at new fewer than one medical center of the Department of Veterans Affairs, or such other facility of the Department as the Secretary considers appropriate, in each state. The pro bono legal assistance consists of (1) legal assistance with any program administered by the Secretary; (2) legal assistance associated with improving the status of a military discharge or characterization of service in the Armed Forces, including through a discharge review board, or seeking a review of a military record before a board of correction for military or naval records; and (3) such other legal assistance as the Secretary considers appropriate and determines may be needed by eligible individuals.

[END OF SUPPLEMENT]

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Footnotes

- | | |
|---|--|
| 1 | 5 U.S.C.A. § 500. |
| 2 | 38 U.S.C.A. § 5901. |
| 3 | 38 U.S.C.A. § 5902(b). |
| 4 | 38 U.S.C.A. § 5902(a)(1).
As to veterans' organizations, generally, see §§ 146 to 164 . |
| 5 | 38 U.S.C.A. § 5903(a)(1). |
| 6 | 38 U.S.C.A. § 5903(a)(2). |
| 7 | 38 U.S.C.A. § 5904(a). |

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XIII. Claims for Veterans' Benefits; Decisions; Appeal and Review


A. Claims, Applications, and Decisions of Secretary of Veterans Affairs; Payment of Claims

2. Evidence and Proof of Claim

§ 169. Evidence of claim; burden of submitting evidence to support claim

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  130, 132

If the application of a person claiming veterans' benefits is incomplete, the Secretary of Veterans Affairs must notify the claimant of the evidence necessary to complete the application,¹ and the evidence must be received by the Secretary within one year from the date of the notification.²

If, after a claimant's application for accrued benefits is found to be incomplete at the time it is originally submitted, the Secretary notifies the claimant of the evidence necessary to complete the application, and such evidence is not received within one year from the date of such notification, no accrued benefits may be paid.³

Except when otherwise provided by law, a claimant has the responsibility to present and support a claim for benefits.⁴

Where the determinative issue is factual in nature, lay testimony may suffice by itself;⁵ although with regard to issues involving questions of medical etiology or diagnosis, this is not so.⁶ For purposes of benefits under laws administered by the Secretary, the Secretary may accept the written statement of a claimant as proof of the existence of marriage, dissolution of a marriage, the birth of a child, or the death of any family member for the purpose of acting on such individual's claim for benefits.⁷ The Secretary may require the submission of documentation in support of the claimant's statement if the claimant does not reside within a state,⁸ the statement on its face raises a question as to its validity,⁹ there is conflicting information of record,¹⁰ or there is reasonable indication, in the statement or otherwise, of fraud or misrepresentation.¹¹

In a state proceeding, it is error for a hearing officer to base his or her determination of a veteran's qualifications for a position upon facts outside the resume which the veteran submits as the burden is on the veteran to insure that his or her resume is sufficiently informative to enable the government body involved to properly evaluate his or her qualifications.¹²

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Footnotes

- 1 § 167.
- 2 38 U.S.C.A. § 5103(b).
- 3 38 U.S.C.A. § 5121(c).
- 4 38 U.S.C.A. § 5107(a).
Federal regulations regarding evidence requirements with regard to veterans' benefits claims are contained in 38 C.F.R. §§ 3.200 to 3.217.
- 5 Beausoleil v. Brown, 8 Vet. App. 459 (1996).
- 6 § 170.
- 7 38 U.S.C.A. § 5124(a), (b).
- 8 38 U.S.C.A. § 5124(c)(1).
- 9 38 U.S.C.A. § 5124(c)(2).
- 10 38 U.S.C.A. § 5124(c)(3).
- 11 38 U.S.C.A. § 5124(c)(4).
- 12 Harris v. State, Public Employees Relations Com'n, 568 So. 2d 475 (Fla. 1st DCA 1990).

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XIII. Claims for Veterans' Benefits; Decisions; Appeal and Review

A. Claims, Applications, and Decisions of Secretary of Veterans Affairs; Payment of Claims

2. Evidence and Proof of Claim

§ 170. Medical evidence, generally

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West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  130, 132

Where the determinative issue in a claim for veterans' benefits involves either medical etiology or a medical diagnosis as evidence, competent medical evidence¹ to the effect that the claim is "plausible" or "possible,"²—that is, of the nexus between a current condition and in-service disease or condition³—is required; a layperson is not competent to provide such medical evidence.⁴

When, in the judgment of the Secretary of Veterans Affairs, expert medical opinion, in addition to that available within the Department, is warranted by the medical complexity or controversy involved in a case being considered by the Department, the Secretary may secure an advisory medical opinion from one or more independent medical experts who are not employees of the Department.⁵

For purposes of establishing any claim for benefits under provisions pertaining to compensation for service connected disability or death⁶ or pensions for non-service-connected disability or death or for service,⁷ a report of a medical examination administered by a private physician that is provided by a claimant in support of a claim for benefits may be accepted without a requirement for confirmation by an examination by a physician employed by the Veterans Health Administration if the report is sufficiently complete to be adequate for the purpose of adjudicating such claim.⁸

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Footnotes

¹ [Beausoleil v. Brown](#), 8 Vet. App. 459 (1996).

2 [Gregory v. Brown, 8 Vet. App. 563 \(1996\).](#)

3 [Johnson v. Brown, 8 Vet. App. 423 \(1995\).](#)

A veteran's claims of service connection for Huntington's chorea and vascular headaches were not well-grounded, since he failed to submit medical evidence linking either the onset or the aggravation of the disability to his period in service. [Dean v. Brown, 8 Vet. App. 449 \(1995\).](#)

4 [Johnson v. Brown, 8 Vet. App. 423 \(1995\).](#)

A diagnosis and an analysis of the etiology of a heart disorder, hypertension, and hemorrhoids require competent medical evidence and cannot be evidenced by the appellant's lay testimony. Under [38 U.S.C.A. § 1154\(b\)](#), an appellant may use lay testimony to show that the medical condition (rectal bleeding) happened in service but not to show a current diagnosis or a nexus between a current condition and service. [Gregory v. Brown, 8 Vet. App. 563 \(1996\).](#)

As to the proof of service connection, generally, see [§ 171](#).

5 [38 U.S.C.A. § 5109\(a\).](#)

6 [38 U.S.C.A. §§ 1101 to 1163.](#)

7 [38 U.S.C.A. §§ 1501 to 1562.](#)

8 [38 U.S.C.A. § 5125.](#)

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XIII. Claims for Veterans' Benefits; Decisions; Appeal and Review


A. Claims, Applications, and Decisions of Secretary of Veterans Affairs; Payment of Claims

2. Evidence and Proof of Claim

§ 171. Service connection

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West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  130, 132

A service connection claim must be accompanied by evidence which establishes that the claimant currently has the claimed disability.¹ For a direct service connection to be awarded, there must be: (1) medical evidence of a current disability; (2) medical evidence or, in certain circumstances, lay evidence of an in-service incurrence or aggravation of a disease or injury; and (3) medical evidence of a nexus between the claimed in-service disease or injury and the present disease or injury.² Secondary service connection claims must also be well grounded.³

In regulations pertaining to service connection of disabilities, the Secretary of Veterans Affairs is required to include provisions, in effect, requiring that in each case where a veteran is seeking service connection for any disability, due consideration must be given to the places, types, and circumstances of such veteran's service as shown by such veteran's service record, the official history of each organization in which such veteran served, such veteran's medical records, and all pertinent medical and lay evidence.⁴ Where a veteran who engaged in combat with the enemy in active service with a military, naval, or air organization of the United States during a period of war, campaign, or expedition alleges that a disease or injury was incurred in, or aggravated by, such service, the Secretary of Veterans Affairs must accept satisfactory lay or other evidence of service incurrence or aggravation of such injury or disease, if consistent with the circumstances, conditions, or hardships of such service, as sufficient proof of the service connection of the disease or injury, notwithstanding the fact that there is no official record of such incurrence or aggravation.⁵ In doing so, every reasonable doubt must be resolved in favor of the veteran⁶ although the service connection of such injury or disease may be rebutted by clear and convincing evidence to the contrary.⁷ A veteran must have personally participated in events constituting an actual fight or encounter with a military foe or hostile unit or instrumentality, as determined on a case-by-case basis, to be "engaged in combat with the enemy" so as to trigger this relaxed evidentiary standard for proving service connection of an injury.⁸

The reasons for granting or denying service connection in each case must be recorded in full.⁹ Because the law specifically provides that service connection may be proven by satisfactory lay evidence, without the support of official records, it follows that the absence of such official clinical evidence alone is not sufficient to rebut the lay evidence.¹⁰ However, the statutory provision pertaining to proof of service connection of a disease or injury¹¹ does not establish service connection for a combat veteran but aids the combat veteran by relaxing the adjudicative evidentiary requirements for determining what happened in service.¹²

CUMULATIVE SUPPLEMENT

Statutes:

38 U.S.C.A. § 1154(b), as amended effective January 1, 2021, struck out "or air organization" and inserted "air, or space organization."

[END OF SUPPLEMENT]

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Footnotes

- 1 [Wamhoff v. Brown](#), 8 Vet. App. 517 (1996); [Caluza v. Brown](#), 7 Vet. App. 498 (1995), *aff'd*, 78 F.3d 604 (Fed. Cir. 1996).
As to the effect of service connection on eligibility for veterans' benefits, generally, see §§ 29, 30.
- 2 [Gutierrez v. Principi](#), 19 Vet. App. 1 (2004).
Medical treatise evidence presented by a veteran was sufficient to establish a nexus between the in-service occurrence of bacillary dysentery and his current disability caused by ankylosing spondylitis, satisfying the element of a well-grounded claim of a service connection; the treatise evidence did not simply provide speculative generic statements but discussed generic relationships with a degree of certainty such that there was at least plausible causality based upon objective facts rather than on an unsubstantiated lay medical opinion. [Wallin v. West](#), 11 Vet. App. 509 (1998).
- 3 [Evans v. West](#), 12 Vet. App. 22 (1998).
- 4 38 U.S.C.A. § 1154(a).
In a veteran's claim for service connection for a psychiatric disorder, the Veterans Court committed legal error by requiring that lay evidence of medical symptoms be accompanied by contemporaneous medical records as lay evidence must be considered, if submitted, when a veteran's claim seeks disability benefits, and lay evidence alone can be sufficient to establish a chronic disease. [Buchanan v. Nicholson](#), 451 F.3d 1331 (Fed. Cir. 2006).
- 5 38 U.S.C.A. § 1154(b).
- 6 38 U.S.C.A. § 1154(b).
- 7 38 U.S.C.A. § 1154(b).
- 8 [Moran v. Peake](#), 525 F.3d 1157 (Fed. Cir. 2008).
- 9 38 U.S.C.A. § 1154(b).
- 10 [Sheets v. Derwinski](#), 2 Vet. App. 512 (1992).
- 11 38 U.S.C.A. § 1154(b).
- 12 [Gregory v. Brown](#), 8 Vet. App. 563 (1996).

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XIII. Claims for Veterans' Benefits; Decisions; Appeal and Review


A. Claims, Applications, and Decisions of Secretary of Veterans Affairs; Payment of Claims

2. Evidence and Proof of Claim

§ 172. Presumption as to sound condition of veteran when examined, accepted, or enrolled for service

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West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  [130](#), [132](#)

Treatises and Practice Aids

Presumption of prior sound condition, Federal Procedure, L. Ed., Veterans and Veterans Affairs [\[Westlaw®\(r\): Search Query\]](#)

For purposes of the basic-entitlement provision for wartime-disability compensation,¹ every veteran will be taken to have been in sound condition when examined, accepted, and enrolled for service except as to defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment or where clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment and was not aggravated by such service.² The term "defect" in the applicable statutory provision³ necessarily means a defect that amounts to or arises from disease or injury, and in this regard, a personality disorder is not the type of disease- or injury-related defect to which the presumption of soundness can apply.⁴

The presumption of sound condition attaches only where there has been an induction examination in which the later complained-of disability was not detected.⁵ In order to rebut the presumption of soundness that applies to all veterans upon entrance to the military, the government must show by clear and unmistakable evidence that the veteran's disability existed prior to service and that the preexisting disability was not aggravated during service.⁶ To satisfy the nonaggravation requirement, the government must rebut the statutory presumption of aggravation by showing, by clear and unmistakable evidence, either that there was no

increase in disability during service or that any increase in disability was due to the natural progression of the condition.⁷ If the presumption of soundness is properly rebutted, the veteran is not entitled to service connected disability benefits unless he or she can show his or her condition was aggravated by military service.⁸

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Footnotes

- 1 38 U.S.C.A. § 1110, as discussed, generally, in §§ 30, 30.
- 2 38 U.S.C.A. § 1111.
- 3 38 U.S.C.A. § 1111.
- 4 *Winn v. Brown*, 8 Vet. App. 510 (1996).
- 5 *Verdon v. Brown*, 8 Vet. App. 529 (1996).
- 6 *Joyce v. Nicholson*, 443 F.3d 845 (Fed. Cir. 2006).
- 7 *Joyce v. Nicholson*, 443 F.3d 845 (Fed. Cir. 2006).
- 8 *Winn v. Brown*, 8 Vet. App. 510 (1996).
As to proof of aggravation of injury, see § 173.

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77 Am. Jur. 2d Veterans and Veterans Laws § 173

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XIII. Claims for Veterans' Benefits; Decisions; Appeal and Review


A. Claims, Applications, and Decisions of Secretary of Veterans Affairs; Payment of Claims

2. Evidence and Proof of Claim

§ 173. Aggravation of injury

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  130, 132

A preexisting injury or disease will be considered to have been "aggravated" by active military, naval, or air service where there is an increase in disability during such service unless there is a specific finding that the increase in disability is due to the natural progress of the disease.¹ No compensation will be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.² The question whether there has been an increase in disability during service must be answered in the affirmative before the presumption of aggravation attaches.³

Practice Tip:

The determination whether a disability found to be preexisting was aggravated by service is a question of fact.⁴

Temporary or intermittent flare-ups during service of a preexisting injury or disease are not sufficient to be considered aggravation in service under the statute unless the underlying condition, as contrasted to the symptoms, is worsened.⁵ Where a preexisting disability has been medically or surgically treated during service, and the usual effects of the treatment have

ameliorated the disability so that it is no more disabling than it was at entry into service, the presumption of aggravation does not attach as to that disability.⁶

Observation:

A veteran has an opportunity to establish a rebuttable presumption of aggravation by providing the kind of evidence one engaged in combat or held as a prisoner of war is most likely to have available—lay testimony or other informal evidence of symptomatic manifestations, whether temporary or otherwise, of incurrence or aggravation. Once this showing has been made, the government has the burden to rebut by clear and convincing proof that there has been no increase in the severity of the preexisting condition, thereby establishing lack of a statutory requirement, or that any increase was the result of natural progression.⁷

CUMULATIVE SUPPLEMENT

Statutes:

[38 U.S.C.A. § 1153](#), as amended effective January 1, 2021, struck out " or air service" and inserted "air, or space service."

[END OF SUPPLEMENT]

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Footnotes

- | | |
|---|---|
| 1 | 38 U.S.C.A. § 1153 . |
| 2 | 38 U.S.C.A. § 1110 , as discussed in § 30 . |
| 3 | Verdon v. Brown , 8 Vet. App. 529 (1996). |
| 4 | Verdon v. Brown , 8 Vet. App. 529 (1996). |
| 5 | Hunt v. Derwinski , 1 Vet. App. 292 (1991). |
| 6 | Verdon v. Brown , 8 Vet. App. 529 (1996). |
| 7 | Jensen v. Brown , 19 F.3d 1413 (Fed. Cir. 1994). |

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77 Am. Jur. 2d Veterans and Veterans Laws § 174

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XIII. Claims for Veterans' Benefits; Decisions; Appeal and Review

A. Claims, Applications, and Decisions of Secretary of Veterans Affairs; Payment of Claims

2. Evidence and Proof of Claim

§ 174. Presumption of death

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  130, 132

Treatises and Practice Aids

Presumption of death by reason of unexplained absence, Federal Procedure, L. Ed., Veterans and Veterans Affairs[[Westlaw®\(r\): Search Query](#)]

No state law providing for presumption of death is applicable to claims for benefits under laws administered by the Secretary of Veterans Affairs.¹ If evidence satisfactory to the Secretary is submitted establishing the continued and unexplained absence of any individual from that individual's home and family for seven or more years, and establishing that after diligent search, no evidence of that individual's existence after the date of disappearance has been found or received, the death of such individual as of the date of the expiration of such period must be considered as sufficiently proved.² Except in a suit brought pursuant to a statute pertaining to contracts of national service life insurance,³ the finding of death made by the Secretary is final and conclusive.⁴

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Footnotes

¹ 38 U.S.C.A. § 108(a).

2 38 U.S.C.A. § 108(b).

3 38 U.S.C.A. § 1984.

As to National Service Life Insurance, generally, see Am. Jur. 2d, Insurance[[Westlaw®\(r\): Search Query](#)].

4 38 U.S.C.A. § 108(c).

As to the conclusiveness and finality of findings made by the Secretary of Veterans Affairs, generally, see § 178.

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XIII. Claims for Veterans' Benefits; Decisions; Appeal and Review

A. Claims, Applications, and Decisions of Secretary of Veterans Affairs; Payment of Claims

3. Decision of and Review of Claim by Secretary of Veterans Affairs

§ 175. Decision, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  130 to 134

Treatises and Practice Aids

Right to notice, Federal Procedure, L. Ed., Veterans and Veterans Affairs [[Westlaw®\(r\): Search Query](#)]

The Secretary of Veteran Affairs must decide all questions of law and fact necessary to a decision by him or her under a law that affects the provision of benefits by the Secretary to veterans or veterans' dependents or survivors.¹ In the case of a decision by the Secretary affecting the provision of benefits to a claimant,² the Secretary must, on a timely basis, provide to the claimant, and to the claimant's representative, notice of such decision.³ The notice must include an explanation of the procedure for obtaining review of the decision.⁴ In any case where the Secretary denies a benefit sought, the notice must also include a statement of the reasons for the decision⁵ and a summary of the evidence considered by the Secretary.⁶

Practice Tip:

Because of the nonadversarial, informal nature of the VA claims-adjustment system, it should not be lightly assumed that a person not a party to a claim is bound by an adjudication of that claim.⁷

If the Secretary determines that benefits administered by the Department have not been provided by reason of administrative error on the part of the federal government or any of its employees, the Secretary may provide such relief on account of such error as the Secretary determines equitable, including the payment of moneys to any person whom the Secretary determines is equitably entitled to such moneys.⁸

Practice Tip:

Specific statutory requirements must be met to notify applicants for certain veterans' benefits or services that income information furnished by the applicant to the Secretary may be compared with information obtained by the Secretary from the Commissioner of Social Security or the Secretary of the Treasury.⁹

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Footnotes

- 1 38 U.S.C.A. § 511(a).
- 2 38 U.S.C.A. § 511.
- 3 38 U.S.C.A. § 5104(a).
- 4 38 U.S.C.A. § 5104(a).
- 5 38 U.S.C.A. § 5104(b)(1).
- 6 38 U.S.C.A. § 5104(b)(2).
- 7 *Zevalkink v. Brown*, 6 Vet. App. 483 (1994), *aff'd*, 102 F.3d 1236 (Fed. Cir. 1996).
- 8 § 16.
- 9 38 U.S.C.A. § 5317.

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XIII. Claims for Veterans' Benefits; Decisions; Appeal and Review

A. Claims, Applications, and Decisions of Secretary of Veterans Affairs; Payment of Claims

3. Decision of and Review of Claim by Secretary of Veterans Affairs

§ 176. Reopening of claim upon presentation of new and material evidence

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  134

Treatises and Practice Aids

New and material evidence, Federal Procedure, L. Ed., Veterans and Veterans Affairs [\[Westlaw®\(r\): Search Query\]](#)

New evidence; reopening of claim, Federal Procedure, L. Ed., Veterans and Veterans Affairs [\[Westlaw®\(r\): Search Query\]](#)

If new and material evidence is presented or secured with respect to a claim which has been disallowed, the Secretary of Veterans Affairs must reopen the claim and review the former disposition of the claim.¹ In determining whether new and material evidence is required because a claim rests on the same factual basis as a previously disallowed claim, the focus of the analysis of the Board of Veterans Appeals must be on whether the evidence presented truly amounts to a new claim "based upon distinctly diagnosed diseases or injuries" or whether it is evidence tending to substantiate an element of the previously adjudicated matter.² If the claim is the same, reopening requires a sequential analysis of two questions: (1) has the necessary new and material evidence been presented to justify reopening the claim; if so, (2) is the veteran entitled to an award of benefits based on all of the evidence of record.³ Whether new and material evidence has been presented on a claim to reopen is a jurisdictional issue for the Board of Veterans Appeals; thus, it must be asked and answered by the Board de novo whenever a claim to reopen is filed, and an unfavorable answer to the question requires a summary dismissal of the claim.⁴

Evidence regarding a veteran's previously denied service connection claim is "new and material," as would justify the reopening of such a claim by the Board of Veterans Appeals, if: (1) it was not of record at the time of the last final disallowance of the claim⁵ and is not merely cumulative of the evidence of record;⁶ (2) it is probative of the issue at hand; and, if it is new and probative; and (3) it is reasonably likely to change the outcome when viewed in light of all the evidence of record.⁷

A letter from a physician regarding a veteran's chest trauma, though new, was not material since it did not link the chest trauma specifically to the veteran's existing lung disease condition.⁸ Duplicates of records previously before the Board of Veterans Appeals are not new and, thus, do not provide a basis for reopening a claim.⁹ "Material" evidence is evidence which is relevant to and probative of the issue at hand and which creates a reasonable possibility that the new evidence, when considered in light of all the evidence, would change the outcome.¹⁰ Strictly for purposes of determining whether new and material evidence has been presented, the Board of Veterans Appeals must presume that newly submitted evidence is credible unless it is patently incredible.¹¹

New and material evidence is not required to reopen the claim of a former prisoner of war for a disease which is presumptively service connected under the applicable statute;¹² all that is required is that the former prisoner of war submit a well-grounded claim.¹³

Practice Tip:

Competent medical evidence is required for claims to reopen where the determinative issue involves either medical etiology or medical diagnosis, but lay testimony by itself may be sufficient where the determinative issue does not require medical expertise.¹⁴

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Footnotes

- 1 38 U.S.C.A. § 5108.
- 2 *Velez v. Shinseki*, 23 Vet. App. 199 (2009).
- 3 *Woehlaert v. Nicholson*, 21 Vet. App. 456 (2007).
- 4 *Woehlaert v. Nicholson*, 21 Vet. App. 456 (2007).
- 5 *Mercado-Martinez v. West*, 11 Vet. App. 415 (1998).
- 6 *Mercado-Martinez v. West*, 11 Vet. App. 415 (1998); *Graves v. Brown*, 8 Vet. App. 522 (1996).
- 7 *Mercado-Martinez v. West*, 11 Vet. App. 415 (1998).
- 8 *Beausoleil v. Brown*, 8 Vet. App. 459 (1996).
- 9 *Barbour v. Principi*, 3 Vet. App. 476 (1992).
- 10 *Graves v. Brown*, 8 Vet. App. 522 (1996).
- 11 *Duran v. Brown*, 7 Vet. App. 216 (1994).
- 12 *Roncevich v. Brown*, 7 Vet. App. 192 (1994).
- 13 *Roncevich v. Brown*, 7 Vet. App. 192 (1994).
- 14 *Allday v. Brown*, 7 Vet. App. 517 (1995).

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XIII. Claims for Veterans' Benefits; Decisions; Appeal and Review

B. Appeal and Review

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Research References

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  134.5 to 169

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A.L.R. Index, Veterans and Veterans Administration

West's A.L.R. Digest, [Armed Services](#)  134.5 to 169

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XIII. Claims for Veterans' Benefits; Decisions; Appeal and Review

B. Appeal and Review

1. In General

§ 177. Appeal and review, generally

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West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  136, 150, 168

A.L.R. Library

[Deprivation of Due Process in Connection with Veteran's Right to Disability, Medical, or Mental Health Benefits, Treatment, or Services, 83 A.L.R. Fed. 2d 133](#)

Treatises and Practice Aids

[Right to review; notice, Federal Procedure, L. Ed., Veterans and Veterans Affairs](#) [\[Westlaw®\(r\): Search Query\]](#)

Forms

Forms relating to review or appeal of veterans claims, generally, see Federal Procedural Forms, Veterans and Veterans Laws[[Westlaw®\(r\) Search Query](#)]

Congress has established an exclusive review procedure for veterans' benefits determinations.¹ Federal district courts continue to have jurisdiction to hear facial constitutional challenges to legislation affecting veteran's benefits² although there is also authority to the effect that, in the wake of subsequent statutory changes in veterans' laws, the vitality of this view is debatable.³ Other constitutional and statutory claims must be pursued within the appellate mill Congress established with regard to veterans' benefits.⁴ Claims for appeals under the veterans' laws have been specifically made subject by statute to review in the Board of Veterans Appeals,⁵ the United States Court of Appeals for Veterans Claims,⁶ and the United States Court of Appeals for the Federal Circuit.⁷

Practice Tip:

Because a claim that a veteran was improperly denied veterans benefits is exclusively within the jurisdiction of the Court of Appeals for Veterans Claims,⁸ the United States Court of Federal Claims therefore does not have jurisdiction over such claims.⁹

Under a statute giving the Secretary of the Army the authority to determine a soldier's disability rating and to determine whether that soldier should be placed on the Army's Temporary Disabled Retired List, court review of such a determination is available but under a deferential review standard.¹⁰ The Court of Federal Claims will overturn such determinations only if the plaintiff shows by cogent and clearly convincing evidence that such determinations are arbitrary, capricious, or not supported by substantial evidence.¹¹

The Ninth Circuit Court of Appeals lacks jurisdiction to review the Department of Veterans Affairs' regulations regarding service connection for residuals of radiation exposure since the Department's rule-making is subject to judicial review only in the Federal Circuit.¹²

Observation:

Under some state veterans' preferences statutes, when a decision on whether a veteran working as a public employee was properly discharged is appealed to a state appellate court, the state commissioner of veterans affairs' factual findings must be upheld if they are supported by substantial evidence on the record as a whole.¹³

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Footnotes

- 1 [Zuspann v. Brown](#), 60 F.3d 1156, 12 A.D.D. 239 (5th Cir. 1995).
- 2 [Larrabee by Jones v. Derwinski](#), 968 F.2d 1497 (2d Cir. 1992).
A veteran's claim that defendants had denied him adequate medical care in violation of the Rehabilitation Act and the Due Process Clause was not a facial attack on a statute but a complaint about the denial of benefits, and thus, a federal district court correctly concluded that it lacked subject-matter jurisdiction. [Zuspann v. Brown](#), 60 F.3d 1156, 12 A.D.D. 239 (5th Cir. 1995).
- 3 [Hall v. U.S. Dept. Veterans Affairs](#), 85 F.3d 532 (11th Cir. 1996).
- 4 [Larrabee by Jones v. Derwinski](#), 968 F.2d 1497 (2d Cir. 1992).
- 5 §§ 179 to 183.
- 6 §§ 184 to 193.
- 7 §§ 194 to 198.
- 8 § 184.
- 9 [Sanders v. U.S.](#), 34 Fed. Cl. 75 (1995), *aff'd*, 104 F.3d 376 (Fed. Cir. 1996).
- 10 [Easley v. U.S.](#), 31 Fed. Cl. 129 (1994).
- 11 [Easley v. U.S.](#), 31 Fed. Cl. 129 (1994).
- 12 [Chinnock v. Turnage](#), 995 F.2d 889 (9th Cir. 1993).
As to review in the Court of Appeals for the Federal Circuit, see §§ 194 to 198.
- 13 [Harr v. City of Edina](#), 541 N.W.2d 603 (Minn. Ct. App. 1996).

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XIII. Claims for Veterans' Benefits; Decisions; Appeal and Review

B. Appeal and Review

1. In General

§ 178. Review of decisions of Secretary of Veterans Affairs

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West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  [136](#), [150](#), [153](#), [168](#), [169](#)

A.L.R. Library

[Validity, construction, and application of 38 U.S.C.A. sec. 211\(a\) precluding judicial or other review of Administrative decisions on veterans' benefits, 18 A.L.R. Fed. 915](#)

Forms

Forms relating to review or appeal of veterans claims, generally, see Federal Procedural Forms, Veterans and Veterans Laws[[Westlaw®\(r\) Search Query](#)]

Under federal law, except for matters regarding judicial review of certain rules and regulations,¹ matters covered by certain statutes pertaining to civil actions regarding life insurance,² matters arising under provisions pertaining to housing and small-business loans,³ and matters covered by statutes pertaining to the United States Court of Appeals for Veterans Claims,⁴ the decision of the Secretary of Veterans Affairs as to any question of law or fact necessary to a decision by him or her under a law

that affects the provision of benefits by the Secretary to veterans or veterans' dependents or survivors is final and conclusive, and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.⁵ If a case challenging a decision affecting the provision of benefits to a veteran does not fall within one of the four exceptions listed in the statute precluding judicial review of veterans' benefits determinations, it is not reviewable by any court or other body.⁶ Thus, the Court of Federal Claims does not have jurisdiction to review veteran benefit determinations,⁷ and a veteran's state tort action brought against a Department of Veterans Affairs physician under the Federal Tort Claims Act is properly dismissed by a federal district court for lack of subject-matter jurisdiction where it would necessitate consideration of issues of law and fact involving a decision to reduce veteran's benefits.⁸

The provision generally precluding review of decisions of the Secretary⁹ does not violate a veteran's right of access to the courts.¹⁰ The statute is not a "punishment" under the terms of the Eighth Amendment, it does not qualify as a bill of attainder, and the Ex Post Facto Clause is inapplicable.¹¹

Practice Tip:

If an appellant who has demonstrated error has met the burden of going forward on the issue of prejudice, by asserting with specificity how the error was prejudicial, it becomes the burden of the Secretary of Veterans Affairs to demonstrate that the error was clearly nonprejudicial to the appellant, that is, that the error is not one that affected the essential fairness of the adjudication.¹²

Provision is made by statute for judicial review of actions of the Secretary of Veterans Affairs to which the provision of the Freedom of Information Act dealing with the publication of descriptions of agency organization and agency rules of substance and procedure¹³ or the provision of the Federal Administrative Procedure Act regarding notice and comment rule-making,¹⁴ or both, refer. Generally, such review must be in accordance with the judicial review provisions of the Administrative Procedure Act¹⁵ and may be sought only in the United States Court of Appeals for the Federal Circuit.¹⁶ However, if such review is sought in connection with an appeal brought in the United States Court of Appeals for Veterans Claims, the statutes governing such appeals shall apply.¹⁷

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Footnotes

- 1 38 U.S.C.A. § 511(b)(1) (referring to matters subject to 38 U.S.C.A. § 502).
- 2 38 U.S.C.A. § 511(b)(2) (referring to matters subject to 38 U.S.C.A. §§ 1975, 1984).
- 3 38 U.S.C.A. § 511(b)(3) (referring to matters subject to 38 U.S.C.A. §§ 3701 to 3765).
- 4 38 U.S.C.A. § 511(b)(4).
- 5 As to the United States Court of Appeals for Veterans Claims, generally, see §§ 184 to 193.
- 6 38 U.S.C.A. § 511(a).
- 7 *Blue Water Navy Vietnam Veterans Association, Inc. v. McDonald*, 82 F. Supp. 3d 443 (D.D.C. 2015).
- 8 *Kalick v. United States*, 109 Fed. Cl. 551 (2013), *aff'd*, 541 Fed. Appx. 1000 (Fed. Cir. 2013).
- 9 *Hicks v. Small*, 69 F.3d 967 (9th Cir. 1995).

9 38 U.S.C.A. § 511(a).
10 Marozsan v. U.S., 90 F.3d 1284 (7th Cir. 1996).
11 Marozsan v. U.S., 90 F.3d 1284 (7th Cir. 1996).
12 Mayfield v. Nicholson, 19 Vet. App. 103 (2005), motion for full-court review denied, 19 Vet. App. 220
(2005) and rev'd and remanded on other grounds, 444 F.3d 1328 (Fed. Cir. 2006).
13 5 U.S.C.A. § 552(a)(1), as discussed, generally, in Am. Jur. 2d, Freedom of Information Acts[Westlaw®(r):
Search Query].
14 5 U.S.C.A. § 553, as discussed, generally, in Am. Jur. 2d, Administrative Law[Westlaw®(r): Search Query].
15 38 U.S.C.A. § 502, referring to 5 U.S.C.A. §§ 701 et seq.
16 § 194.
17 38 U.S.C.A. § 502.
Appeals in the United States Court of Appeals for Veterans Claims, generally, see §§ 184 to 193.

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XIII. Claims for Veterans' Benefits; Decisions; Appeal and Review

B. Appeal and Review

2. Board of Veterans Appeals

§ 179. Jurisdiction; commencement of proceedings; hearings

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West's Key Number Digest, [Armed Services](#)  136 to 140

Treatises and Practice Aids

Function and jurisdiction, Federal Procedure, L. Ed., Veterans and Veterans Affairs [\[Westlaw®\(r\): Search Query\]](#)

Forms

Forms relating to jurisdiction for administrative hearings for veterans, generally, see Federal Procedural Forms, Veterans and Veterans Laws [\[Westlaw®\(r\) Search Query\]](#)

Provision is made by federal statute for a Board of Veterans Appeals within the Department of Veterans Affairs.¹ All questions in a matter which, by statute,² is subject to a decision by the Secretary of Veterans Affairs are subject to one review on appeal to the Secretary, the final decision upon which appeal is to be made by the Board of Veterans Affairs.³

A statute governs the filing of notice of disagreement and appeal;⁴ appellate review will be initiated by a notice of disagreement and completed by a substantive appeal after a statement of the case is furnished as prescribed by statute.⁵ Each appellant must be accorded hearing and representation rights pursuant to the provisions of the statutes pertaining to the Board⁶ and regulations of the Secretary.⁷

Provision is also made by statute with regard to the procedure for appealing simultaneously contested claims, where one claim is allowed and one is rejected,⁸ for administrative appeals;⁹ the order of considering appeals;¹⁰ the deciding of appeals only after an opportunity for hearing has been afforded the appellant;¹¹ the hearing docket and persons to conduct the hearing;¹² the place where the hearing is to be held;¹³ the provision of facilities and equipment to the Board or other components of the Department to enable an appellant located at a facility within the area served by a regional office to participate, through voice transmission or through picture and voice transmission, by electronic or other means;¹⁴ and the screening of cases for purposes of determining the adequacy of the record for decisional purposes¹⁵ or the development, or attempted development, of a record found to be inadequate for decisional purposes.¹⁶ An application for review on appeal may not be entertained unless it is in conformity with the statutory provisions pertaining to the Board.¹⁷

A proceeding instituted before the Board of Veterans Appeals may be assigned to an individual member of the Board or to a panel of not less than three members of the Board. A member or panel assigned a proceeding must make a determination thereon, including any motion filed in connection with the proceeding.¹⁸

The Board of Veterans Appeals has a duty to assist a veteran in securing private medical records where it is possible that outpatient reports not previously secured could possibly establish a service connection for the veteran's disorder.¹⁹ It is the responsibility of the Board, not the Court of Appeals for Veterans Claims,²⁰ to assess the credibility and weight to be given to evidence.²¹

CUMULATIVE SUPPLEMENT

Statutes:

[38 U.S.C.A. § 7105\(a\)](#), as revised effective August 23, 2017, provides that appellate review must be initiated by the filing of a notice of disagreement in the form prescribed by the Secretary of Veterans Affairs.

[38 U.S.C.A. § 7106](#) was repealed effective August 23, 2017. As to the current similar provision, see [38 U.S.C.A. § 7107](#).

[38 U.S.C.A. § 7107](#) was revised effective August 23, 2017, in part by removing subsection (f) and by revising subsection (a) to provide that the Board of Veterans Affairs must maintain at least two separate dockets. The Board may not maintain more than two separate dockets unless the Board notifies the Committee on Veterans' Affairs of the Senate and the Committee on Veterans' Affairs of the House of Representatives of any additional docket, including a justification for maintaining such additional docket.

[38 U.S.C.A. § 7107\(b\)](#), as revised effective August 23, 2017, provides that a case on one of the dockets of the Board of Veterans Affairs maintained may, for cause shown, be advanced on motion for earlier consideration and determination. Any such motion must set forth succinctly the grounds upon which the motion is based. Such a motion may be granted only: if the case involves interpretation of law of general application affecting other claims; if the appellant is seriously ill or is under severe financial hardship; or for other sufficient cause shown.

[38 U.S.C.A. § 7107\(c\)](#), as revised effective August 23, 2017, provides that for cases on a docket maintained by the Board of Veterans Affairs that may include a hearing, in which a hearing is requested in the notice of disagreement, the Board must notify the appellant whether a Board hearing will be held— at its principal location; or by picture and voice transmission at a facility of the Department of Veterans Affairs where the Secretary of Veterans Affairs has provided suitable facilities and equipment to conduct such hearings.

[38 U.S.C.A. § 7107\(d\)](#), as amended effective December 16, 2016, provides that upon request for a hearing, the Board of Veterans' Appeals must determine, for purposes of scheduling the hearing for the earliest possible date, whether a hearing before the Board will be held at its principal location or at a facility of the Department or other appropriate federal facility located within the area served by a regional office of the Department. The Board must also determine whether to provide a hearing through the use of the facilities and equipment described.

[38 U.S.C.A. § 7107\(d\)](#), as revised effective August 23, 2017, provides that nothing in [38 U.S.C.A. § 7107](#) will be construed to preclude the screening of cases for purposes of determining the adequacy of the record for decisional purposes, or the development, or attempted development, of a record found to be inadequate for decisional purposes.

[38 U.S.C.A. § 7107\(e\)](#), as revised effective August 23, 2017, provides that the Secretary of Veterans Affairs must develop and implement a policy allowing an appellant to move the appellant's case from one docket to another docket.

[38 C.F.R. § 19.50](#) was removed effective February 19, 2019. As to current similar provisions, see [38 C.F.R. § 19.100 et seq.](#), as revised.

[38 C.F.R. § 19.75](#) was removed effective February 19, 2019. As to current similar provisions, see [38 C.F.R. § 19.100 et seq.](#), as revised.

[38 C.F.R. § 20.600](#) was renumbered effective February 19, 2019, as [38 C.F.R. § 20.5](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 [38 U.S.C.A. §§ 7101 to 7112](#).
Regulations as to the operation of the Board are contained in [38 C.F.R. §§ 19.1 to 19.14](#).
Regulations concerning rules of practice before the Board are contained in 38 C.F.R. Pt. 20.
- 2 [38 U.S.C.A. § 511\(a\)](#), as discussed, generally, in [§ 178](#).
- 3 [38 U.S.C.A. § 7104\(a\)](#).
- 4 [38 U.S.C.A. § 7105](#).
Regulations regarding appeals processing by the agency of original jurisdiction are contained in [38 C.F.R. §§ 19.23 to 19.38](#).
- 5 [38 U.S.C.A. § 7105\(a\)](#).
A document received by the Department of Veterans Affairs (VA) approximately nine months after a regional office decision assigning veteran a 30% disability rating for post-traumatic stress disorder, namely, a report from a VA vocational rehabilitation specialist stating that the veteran's ability to establish effective relationships with people was considerably impaired, was not a notice of disagreement as the document could not reasonably be construed to express disagreement with a particular decision or reflect an intent to seek appellate review. [Young v. Shinseki, 22 Vet. App. 461 \(2009\)](#).
- 6 [38 U.S.C.A. §§ 7101 to 7112](#).
- 7 [38 U.S.C.A. § 7105\(a\)](#).

Regulations specifically provide as to hearings before the Board at Department of Veterans Affairs field facilities. [38 C.F.R. §§ 19.75, 19.76](#).

Procedural rules as to hearings on appeal may be found at [38 C.F.R. §§ 20.700 to 20.717](#).

Rules regarding representation in Board proceedings are contained in [38 C.F.R. §§ 20.600, 20.608](#).

8 [38 U.S.C.A. § 7105A](#).

Regulations and rules regarding simultaneously contested claims may be found at [38 C.F.R. §§ 19.100 to 19.102, 20.500 to 20.504](#).

9 [38 U.S.C.A. § 7106](#).

Regulations and rules regarding administrative appeals appear at [38 C.F.R. §§ 19.50 to 19.53, 20.400, 20.401](#).

10 [38 U.S.C.A. § 7107\(a\)](#).

11 [38 U.S.C.A. § 7107\(b\)](#).

12 [38 U.S.C.A. § 7107\(c\)](#).

13 [38 U.S.C.A. § 7107\(d\)](#).

14 [38 U.S.C.A. § 7107\(e\)](#).

15 [38 U.S.C.A. § 7107\(f\)\(1\)](#).

16 [38 U.S.C.A. § 7107\(f\)\(2\)](#).

17 [38 U.S.C.A. § 7108](#).

18 [38 U.S.C.A. § 7102\(a\)](#).

19 [Grossman v. Principi, 3 Vet. App. 445 \(1992\)](#).

20 [§ 184](#).

21 [Owens v. Brown, 7 Vet. App. 429 \(1995\)](#).

Reliance by the Board of Veterans Appeals upon hearsay statements of witnesses who were allegedly implicated in fraud underlying an action for forfeiture of veteran's benefits due to fraud did not violate due process as the statements were made against the witnesses' pecuniary interests, thus demonstrating reliability. [Del Rosario v. Peake, 22 Vet. App. 399 \(2009\)](#), *aff'd*, [367 Fed. Appx. 157 \(Fed. Cir. 2010\)](#).

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77 Am. Jur. 2d Veterans and Veterans Laws § 180

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XIII. Claims for Veterans' Benefits; Decisions; Appeal and Review


B. Appeal and Review

2. Board of Veterans Appeals

§ 180. Decisions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  142

Decisions of the Board of Veterans Appeals must be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation.¹ Furthermore, the Board is bound in its decisions by the regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department.²

Each decision of the Board must include a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record³ and an order granting appropriate relief or denying relief.⁴ The Board of Veterans Appeals must include in its decision a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record,⁵ and even when the Board is denying jurisdiction,⁶ the statement must be adequate to enable an appellant to understand the precise basis for the Board's decision, as well as to facilitate review in the Court of Appeals for Veterans Claims.⁷

The member or panel which makes the Board's determination must make a report on its determination which report constitutes the final disposition of the proceeding by the member or panel.⁸ However, it is also provided by statute that the decision of the Board determining a matter in a proceeding is final unless the Chairman orders reconsideration of the decision⁹ to a panel, the makeup of which is specified by statute.¹⁰

The Board, on its own motion, may correct an obvious error in the record without regard to whether there has been a motion or order for reconsideration.¹¹

The Board of Veterans Appeals has jurisdiction over appeals involving contingent fee contracts under which a veteran's attorney is to receive a certain percentage of the amount of any past due benefits awarded on the basis of a veteran's claim, and the Secretary is to pay that fee to the attorney out of those benefits.¹²

Where it is not clear that a claimant has withdrawn a particular claim from an appeal to the Board of Veterans Appeals, it is not sufficient for the Board to conclude that there is an abandonment without providing an adequate statement of reasons or bases to support that conclusion, taking into account all of the facts relating to the status of the claim.¹³

Practice Tip:

A veteran's petition for a writ of mandamus may be denied where the petitioner has not filed a motion for reconsideration of a decision of the Board of Veterans Appeals on remand, thus failing to exhaust the administrative remedies available to him or her.¹⁴

CUMULATIVE SUPPLEMENT

Statutes:

[38 U.S.C.A. § 7104\(d\)\(2\)](#), as added effective August 23, 2017, provides that each decision of the Board of Veterans Affairs must include a general statement reflecting whether evidence was not considered in making the decision because the evidence was received at a time when not permitted under applicable statute; and noting such options as may be available for having the evidence considered by the Department of Veterans Affairs.

[END OF SUPPLEMENT]

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Footnotes

- 1 [38 U.S.C.A. § 7104\(a\)](#).
- 2 [38 U.S.C.A. § 7104\(c\)](#).
- 3 [38 U.S.C.A. § 7104\(d\)\(1\)](#).
- 4 [38 U.S.C.A. § 7104\(d\)\(2\)](#).
- 5 [Cycholl v. Principi](#), 15 Vet. App. 355 (2001), motion for full-court review denied, 16 Vet. App. 103 (2002). The Board of Veterans Appeals did not err in failing to discuss the theory of direct service connection for heart disease and a thyroid disability on appeal of the denial of a veteran's claim for service connection on a secondary basis where neither the veteran nor the record raised the theory of entitlement to service connection on a direct basis. [Robinson v. Peake](#), 21 Vet. App. 545 (2008), judgment aff'd, 557 F.3d 1355 (Fed. Cir. 2009).
- 6 [King v. Nicholson](#), 19 Vet. App. 406 (2006).

- 7 [King v. Nicholson](#), 19 Vet. App. 406 (2006); [Washington v. Nicholson](#), 19 Vet. App. 362 (2005); [Cycholl v. Principi](#), 15 Vet. App. 355 (2001), motion for full-court review denied, 16 Vet. App. 103 (2002).
The Board of Veterans Appeals failed to provide an adequate statement of its reasons and bases for its determination that veteran failed to establish service connection for residuals of back injury he had allegedly suffered in Vietnam, where the Board failed to determine whether the veteran's lay evidence was credible, and prematurely concluded that "the preponderance of the evidence does not demonstrate that the veteran incurred an in-service back injury or that, if he did, it was other than transient in nature and [was] resolved without any residual disability." [Dalton v. Nicholson](#), 21 Vet. App. 23 (2007).
As to review in the United States Court of Appeals for Veterans Claims, generally, see § 184.
- 8 [38 U.S.C.A. § 7102\(a\)](#).
9 [38 U.S.C.A. § 7103\(a\)](#).
10 [38 U.S.C.A. § 7103\(b\)](#).
As to reopening or reconsideration of a claim by the Board, generally, see § 183.
- 11 [38 U.S.C.A. § 7103\(c\)](#).
12 [Scates v. Principi](#), 282 F.3d 1362 (Fed. Cir. 2002).
13 [Verdon v. Brown](#), 8 Vet. App. 529 (1996).
14 [Herrmann v. Brown](#), 8 Vet. App. 60 (1995).

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77 Am. Jur. 2d Veterans and Veterans Laws § 181

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XIII. Claims for Veterans' Benefits; Decisions; Appeal and Review


B. Appeal and Review

2. Board of Veterans Appeals

§ 181. Decisions—Medical basis for decision

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  141, 142

When a decision by the Board of Veterans Appeals relies on the opinion of a Board medical advisor, the claimant must be granted a reasonable opportunity to respond to the medical advisor's opinion¹ by giving the claimant notice and an opportunity to submit comment, argument, and additional evidence challenging an unfavorable medical-advisor opinion.² The Board must provide a medical basis other than its own unsubstantiated conclusions to support its ultimate decision with regard to a disability claim.³ To the extent the Board relies on medical treatises in denying service connection for a medical condition, it errs where it does not give the veteran notice and an opportunity to respond to the treatises.⁴ On the other hand, the Board's use of a medical treatise does not violate the requirement that a claimant be given notice and an opportunity to respond to that treatise where there is a plausible basis in the record for the Board's decision denying a service connection for a medical condition.⁵

When, in the judgment of the Board, expert medical opinion, in addition to that available within the Department of Veterans Affairs, is warranted by the medical complexity or controversy involved in an appeal case, the Board may secure an advisory medical opinion from one or more independent medical experts who are not employees of the Department.⁶ Based on the language of the statute, a decision of the Board to obtain an independent medical expert opinion is a matter left to the discretion of the Board; because the statute does not specifically exclude review by the Court of Appeals for Veterans Claims of the Board's decision and does provide a minimal legal standard, "medical complexity or controversy," which limits the Board's discretion, the Court reviews the Board's decision under the very narrow "abuse of discretion" standard.⁷ The Board's decision to adopt an independent medical expert's opinion may satisfy the statutory requirement for an adequate statement of reasons or bases for its findings and conclusions where the expert has fairly considered material evidence.⁸ When the Board of Veterans Appeals relies on an advisory medical opinion, that opinion must be adequate to allow judicial review.⁹ To be adequate, a medical examination must describe the disability in sufficient detail so that the evaluation of the claimed disability by the Board will be a fully

informed one.¹⁰ If the Board rejects medical evidence that is favorable to the claimant, it must point to a medical basis other than a medical panel's own unsubstantiated opinion which supported the decision.¹¹

CUMULATIVE SUPPLEMENT

Statutes:

[38 U.S.C.A. § 7109](#) was repealed effective August 23, 2017. As to the current similar provision, see [38 U.S.C.A. § 7113](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Winn v. Brown](#), 8 Vet. App. 510 (1996).
- 2 [Austin v. Brown](#), 6 Vet. App. 547 (1994).
- 3 [Rollings v. Brown](#), 8 Vet. App. 8 (1995).
- 4 [Traut v. Brown](#), 6 Vet. App. 495 (1994).
- 5 [Flynn v. Brown](#), 6 Vet. App. 500 (1994).
- 6 [38 U.S.C.A. § 7109\(a\)](#).
- 7 [Boutwell v. West](#), 11 Vet. App. 387 (1998).
- 8 [Wray v. Brown](#), 7 Vet. App. 488 (1995).
- 9 [D'Aries v. Peake](#), 22 Vet. App. 97 (2008).
- 10 [Gill v. Shinseki](#), 26 Vet. App. 386 (2013), *aff'd*, 589 Fed. Appx. 535 (Fed. Cir. 2015).
- 11 [Cathell v. Brown](#), 8 Vet. App. 539 (1996).

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XIII. Claims for Veterans' Benefits; Decisions; Appeal and Review


B. Appeal and Review

2. Board of Veterans Appeals

§ 182. Decisions—Mailing to claimant or authorized representative

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  142

After reaching a decision on a case, the Board of Veterans Appeals must promptly mail a copy of its written decision to the claimant at his or her last known address,¹ and if the claimant has an authorized representative, the Board must mail a copy of its written decision to the authorized representative at the representative's last known address² or send a copy of its written decision to the authorized representative by any means reasonably likely to provide the authorized representative with a copy of the decision within the same time a copy would be expected to reach the authorized representative if sent by first-class mail.³

The term "mail" in this context means that the Board's decision must be correctly addressed, stamped with proper postage, and delivered directly by the Board into the custody of the United States Postal Service.⁴ There is a presumption of regularity in the mailing of a decision of the Board of Veterans Appeals; however, the presumption may be rebutted where there is evidence that an incorrect address was used or evidence that the mailing was returned as undeliverable and there were other possible and plausible addresses available to the Department of Veterans Affairs at the time of the Board decision.⁵

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Footnotes

- 1 [38 U.S.C.A. § 7104\(e\)\(1\).](#)
- 2 [38 U.S.C.A. § 7104\(e\)\(2\)\(A\).](#)
- 3 [38 U.S.C.A. § 7104\(e\)\(2\)\(B\).](#)
- 4 [Davis v. Brown, 7 Vet. App. 298 \(1994\).](#)

5 [Boyd v. McDonald, 27 Vet. App. 63 \(2014\).](#)

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XIII. Claims for Veterans' Benefits; Decisions; Appeal and Review


B. Appeal and Review

2. Board of Veterans Appeals

§ 183. Reopening or reconsidering claim or decision

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  136, 143

Treatises and Practice Aids

Reopening of claim, Federal Procedure, L. Ed., Veterans and Veterans Affairs [\[Westlaw®\(r\): Search Query\]](#)

An order for reconsideration of a decision may be made on the Chairman of the Board of Veterans Appeal's initiative or upon motion of the claimant.¹ However, except as provided in the statute providing for the reopening of claims brought in the Department of Veterans Affairs upon the presentation of new and material evidence,² when a claim is disallowed by the Board of Veterans Appeals, the claim may not thereafter be reopened and allowed, and a claim based upon the same factual basis may not be considered.³ The purpose of this provision is to preserve the finality of Board decisions.⁴

The "factual basis of a claim," for purposes of the statute providing that when a claim is disallowed by the Board of Veterans Appeals, a claim based upon the same factual basis may not be considered, is the veteran's disease or injury rather than the symptoms of the veteran's disease or injury.⁵

The new and material evidence requirement for reopening a claim is a material legal issue which the Board has a legal duty to address, regardless of whether a Veterans Affairs Regional Office adjudicates the claim on the merits and fails to apply the new and material evidence standard, since if the Board adjudicates a claim on the merits without resolving a new and

material evidence issue, its actions would violate its statutory mandate, and similarly, once it finds no new and material evidence, it is bound by express statutory mandate not to consider the merits of the case.⁶ This provision⁷ does not preclude de novo adjudication of a claim on essentially the same facts as a previously and finally denied claim where an intervening and substantive change in law or regulation created a new basis for entitlement to a benefit.⁸ A claim for an increased rating is a new claim, not subject to the statutory provisions prohibiting reopening of previously disallowed claims except upon new and material evidence.⁹

On a claim to reopen a previously and finally disallowed claim, the Board of Veterans Appeals must conduct a two-step analysis. First, it must determine whether the evidence presented or secured since the prior final disallowance of the claim is new and material when viewed in the context of all the evidence, both new and old, and when the credibility of the new evidence is presumed.¹⁰ Second, if the evidence is new and material, the Board must then review it on the merits in the context of the other evidence of record to determine whether the prior disposition of the claim should be altered.¹¹

A panel reconsidering a case must render its decision after reviewing the entire record before the Board.¹² The decision of the panel must be made by a majority vote of the members of the panel and constitutes the final decision of the Board.¹³

CUMULATIVE SUPPLEMENT

Statutes:

[38 U.S.C.A. § 5108](#), as revised effective August 23, 2017, provides that if new and relevant evidence is presented or secured with respect to a supplemental claim, the Secretary of Veterans Affairs must readjudicate the claim taking into consideration all of the evidence of record. If a claimant, in connection with a supplemental claim, reasonably identifies existing records, whether or not in the custody of a federal department or agency, the Secretary must assist the claimant in obtaining the records. This assistance must not be predicated upon a finding that new and relevant evidence has been presented or secured.

[38 U.S.C.A. § 7104\(b\)](#) was amended effective August 23, 2017, by striking "reopened" and inserting "readjudicated."

[38 C.F.R. § 20.1000](#) was renumbered and revised effective February 19, 2019, as [38 C.F.R. § 20.1001](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 [38 U.S.C.A. § 7103\(a\)](#).
- 2 Rules regarding reconsideration may be found at [38 C.F.R. §§ 20.1000 to 20.1003](#).
- 3 [38 U.S.C.A. § 5108](#), discussed in § 176.
- 4 [38 U.S.C.A. § 7104\(b\)](#).
- 5 *Boggs v. Peake*, 520 F.3d 1330 (Fed. Cir. 2008).
- 6 *Boggs v. Peake*, 520 F.3d 1330 (Fed. Cir. 2008).
- 7 *Barnett v. Brown*, 8 Vet. App. 1 (1995), decision *aff'd*, 83 F.3d 1380 (Fed. Cir. 1996).
- 8 [38 U.S.C.A. § 7104\(b\)](#).
- 9 *Spencer v. Brown*, 17 F.3d 368 (Fed. Cir. 1994).
- 10 *Verdon v. Brown*, 8 Vet. App. 529 (1996).
- 11 *Jandoc v. Brown*, 8 Vet. App. 476 (1996).

11 Jandoe v. Brown, 8 Vet. App. 476 (1996).
12 38 U.S.C.A. § 7103(b)(3).
13 38 U.S.C.A. § 7103(b)(3).

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XIII. Claims for Veterans' Benefits; Decisions; Appeal and Review

B. Appeal and Review

3. United States Court of Appeals for Veterans Claims

§ 184. United States Court of Appeals for Veterans Claims; jurisdiction

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West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  155 to 158

Treatises and Practice Aids

Jurisdiction of Court of Appeals for Veterans Claims, Generally, Federal Procedure, L. Ed., Veterans and Veterans Affairs[[Westlaw®\(r\): Search Query](#)]

Forms

Forms relating to jurisdiction for judicial hearings for veterans, generally, see Federal Procedural Forms, Veterans and Veterans Laws[[Westlaw®\(r\) Search Query](#)]

Provision is made by federal statute for the Court of Appeals for Veterans Claims,¹ established under [Article I of the Federal Constitution](#).²

The jurisdiction of the Court of Appeals for Veterans Claims is determined by the date of the Notice of Disagreement that initiates the appellate review of a particular claim in the Board of Veterans Appeals. The fact that new issues may be raised

during the course of proceedings in the Board of Veterans Appeals and on remand to the agency of original jurisdiction does not alter that rule.³ The Court of Appeals for Veterans Claims is a court of review, not of first impression.⁴ The court does not undertake de novo consideration of a particular claim nor grant benefits; rather, the role of the court, among other duties, is to conduct a review of the record to ascertain whether any error has been committed by the Board.⁵

The Court of Appeals for Veterans Claims has exclusive jurisdiction to review decisions of the Board of Veterans Appeals,⁶ including decisions regarding a veteran's claim to disability benefits.⁷ The Secretary of Veterans Affairs may not seek review of any such decision.⁸ The court has the power to affirm, modify, or reverse a decision of the Board or to remand the matter as appropriate.⁹

Practice Tip:

When the Board of Veterans Appeals erroneously concludes that a claim is well-grounded and then proceeds to consider the merits and disallows the claim, the appropriate remedy is to affirm rather than vacate the Board's decision disallowing the claim on the merits.¹⁰

A jurisdictionally valid notice of disagreement must have been submitted with respect to a claim for which reconsideration is sought in order to empower the court to review a denial of such reconsideration by the Chairman of the Board of Veterans Appeals.¹¹

In any action brought under the provisions pertaining to the United States Court of Appeals for Veterans Claims,¹² such court, to the extent necessary to its decision and when presented, must abide by prescribed statutory duties and obligations.¹³

Where a judge of the Court of Appeals for Veterans Claims is sitting alone and refuses to recuse him- or herself upon motion of a litigant, such refusal is subject to review by the court.¹⁴

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Footnotes

- 1 38 U.S.C.A. §§ 7251 to 7299.
- 2 38 U.S.C.A. § 7251.
- 3 *Jackson v. Brown*, 55 F.3d 589 (Fed. Cir. 1995).
- 4 *Schroeder v. Brown*, 6 Vet. App. 220 (1994).
- 5 § 187.
- 6 38 U.S.C.A. § 7252(a).
- 7 *Hale v. U.S.*, 107 Fed. Cl. 339 (2012), *aff'd*, 497 Fed. Appx. 43 (Fed. Cir. 2012); *White v. U.S.*, 101 Fed. Cl. 673 (2011).

The Court of Federal Claims lacked jurisdiction over claims seeking veterans' disability benefits, as judicial review of such claims is vested by statute in the United States Court of Appeals for Veterans Claims and then the Court of Appeals for the Federal Circuit. [Pope v. U.S., 77 Fed. Cl. 737 \(2007\)](#).

8 [38 U.S.C.A. § 7252\(a\)](#).

9 [38 U.S.C.A. § 7252\(a\)](#).

10 [Edenfield v. Brown, 8 Vet. App. 384 \(1995\)](#).

11 [Pagaduan v. Brown, 6 Vet. App. 9 \(1993\)](#).

12 [38 U.S.C.A. §§ 7251 to 7299](#).

13 [38 U.S.C.A. § 7261](#).

14 [Aronson v. Brown, 14 F.3d 1578 \(Fed. Cir. 1994\)](#).

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XIII. Claims for Veterans' Benefits; Decisions; Appeal and Review

B. Appeal and Review

3. United States Court of Appeals for Veterans Claims

§ 185. Notice of appeal

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  [155](#), [160](#), [162](#)

Treatises and Practice Aids

Notice of appeal, Federal Procedure, L. Ed., Veterans and Veterans Affairs [\[Westlaw®\(r\): Search Query\]](#)

Forms

Forms relating to appeal notices, generally, see Federal Procedural Forms, Veterans and Veterans Laws [\[Westlaw®\(r\) Search Query\]](#)

It is provided by statute that in order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans Appeals, a person adversely affected by such decision must file a notice of appeal with the court within 120 days after the date on which notice of the decision is mailed.¹ However, the time limit is not jurisdictional.²

Observation:

A hospital is a "person adversely affected" by a decision denying reimbursement for unauthorized medical expenses incurred by a veteran in such hospital so as to be entitled to appeal under 38 U.S.C.A. § 7266(a).³

The filing of a motion for reconsideration within the 120-day period for filing an appeal with the Court of Appeals for Veterans Claims tolls the period of filing such appeal, and the denial of such motion commences a new 120-day period for filing an appeal with the court.⁴ An appellant must file a notice of appeal by delivering or mailing the notice to the court.⁵ A notice of appeal will be deemed to be received by the court on the date of receipt by the court if the notice is delivered or⁶ on the date of the United States Postal Service postmark stamped on the cover in which the notice is posted if the notice is properly addressed to the court and is mailed.⁷

To have been timely filed, a notice of appeal generally must have been received or, in certain circumstances, be deemed so received by the Court of Appeals for Veterans Claims within 120 days after notice of the underlying final Board of Veterans Appeals decision was mailed.⁸

Observation:

Equitable tolling may apply when an appellant timely misfiles a notice of appeal to the Court of Appeals for Veterans Claims with the Board of Veterans Appeals.⁹ A veteran who attempts to file a notice of appeal by completing a document that is clearly intended to serve as a notice of appeal and who has that document delivered to the regional office from which the veteran's claim originated within the 120-day statutory period for appeal is entitled to invoke the doctrine of equitable tolling.¹⁰

Caution:

A Department of Veterans Affairs form a veteran files with the Board of Veterans Appeals cannot be construed to constitute a notice of appeal where it lacks any indicia of intent to seek review by the Court of Appeals for Veterans Claims.¹¹

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Footnotes

- 1 38 U.S.C.A. § 7266(a).
- 2 Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 131 S. Ct. 1197, 179 L. Ed. 2d 159 (2011).
- 3 St. Patrick Hosp. v. Principi, 4 Vet. App. 55 (1993).
Generally, as to reimbursement of medical expenses for care from sources outside the Department of Veterans Affairs, see § 63.
- 4 Blackburn v. Brown, 8 Vet. App. 97 (1995).
- 5 38 U.S.C.A. § 7266(b).
- 6 38 U.S.C.A. § 7266(c)(1).
- 7 38 U.S.C.A. § 7266(c)(2).
- 8 Evans v. Principi, 16 Vet. App. 28 (2002).
- 9 Brandenburg v. Principi, 371 F.3d 1362 (Fed. Cir. 2004).
- 10 Bailey v. Principi, 351 F.3d 1381 (Fed. Cir. 2003).
- 11 Kouvaris v. Shinseki, 22 Vet. App. 377 (2009) (the document had "Notice of Disagreement" written across the top and also expressed the explicit intent to "file this notice of disagreement with the Department of Veterans Affairs Board of Veterans Appeals").

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XIII. Claims for Veterans' Benefits; Decisions; Appeal and Review

B. Appeal and Review

3. United States Court of Appeals for Veterans Claims

§ 186. Proceedings, generally; contempt authority; assistance in carrying out actions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  155, 159 to 164

The Court of Appeals for Veterans Claims may hear cases by judges sitting alone or in panels as determined pursuant to procedures established by the court.¹ Any such panel will have not fewer than three judges.² The court must establish procedures for the assignment of the judges of the court to such panels and for the designation of the chief of each such panel.³ A majority of the judges of the court will constitute a quorum for the transaction of the business of the court. A vacancy in the court will not impair the powers or affect the duties of the court or of the remaining judges of the court.⁴

The proceedings of the Court of Appeals for Veterans Claims must be conducted in accordance with such rules of practice and procedure as the court prescribes.⁵ Provision is specifically made by statute as to the persons to represent parties in proceedings before the court⁶ and with regard to fee agreements with representatives⁷ and review thereof by the court.⁸

The contempt authority of the court is specified by statute⁹ although the court also possesses inherent authority to impose sanctions,¹⁰ and a statute specifies the assistance available to the court in the carrying out of its lawful writ, process, order, rule, decree, or command as is available to a court of the United States.¹¹

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Footnotes

¹ 38 U.S.C.A. § 7254(b).

² 38 U.S.C.A. § 7254(b).

- 3 38 U.S.C.A. § 7254(b).
4 38 U.S.C.A. § 7254(c)(1).
5 38 U.S.C.A. § 7264(a).
Rules of the Court of Appeals for Veterans Claims have been promulgated. 38 U.S.C.A. App [U.S. Vet. App. R. 1 to 49](#).
6 38 U.S.C.A. § 7263(a), (b).
Congress has limited the role of veterans service organizations before the Court of Appeals for Veterans Claims to act only as representatives authorized to assist individual claimants pursuing their appeals of adverse Department of Veterans Affairs decisions and not as a proper "party" that may appeal to the court. [American Legion v. Nicholson, 21 Vet. App. 1 \(2007\)](#).
7 38 U.S.C.A. § 7263(c).
Work that a claimant's attorney performed before the Federal Circuit on appeal from the Court of Appeals for Veterans Claims in pursuit of securing past-due benefits was the "same work" for attorney's fees purposes as that performed before the Court and the Department of Veterans Affairs, as it was all work on the "same claim," and thus fees awarded under the Equal Access to Justice Act for work done before the Federal Circuit had to be offset against the 30% contingency fee paid by the claimant to the attorney, up to 100% of the total amount of past-due benefits, to preclude a finding that the fee agreement was excessive and unreasonable. [Jackson v. Shinseki, 23 Vet. App. 27 \(2009\)](#).
Award of attorney's fees under the Equal Access to Justice Act, generally, see [§ 191](#).
8 38 U.S.C.A. § 7263(d).
9 38 U.S.C.A. § 7265(a).
10 [Pousson v. Shinseki, 22 Vet. App. 432 \(2009\)](#), subsequent determination, [2009 WL 2252582 \(Veterans App. 2009\)](#).
11 38 U.S.C.A. § 7265(b).

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3. United States Court of Appeals for Veterans Claims

§ 187. Scope and standard of review

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West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  165

The Court of Appeals for Veterans Claims is a court of review, not of first impression.¹ Review in the court must be on the record of proceedings before the Secretary of Veteran Affairs and the Board of Veterans Appeals;² no documents which postdate the Board's decision can be included in the record on appeal.³ The extent of the review of the Court of Appeals for Veterans Claims is limited to the scope provided by statute and subject to specified exceptions.⁴ The court may not review the schedule of ratings for disabilities adopted under a specified statute⁵ or any action of the Secretary in adopting or revising that schedule.⁶

The court of appeals does not undertake de novo consideration of a particular claim nor grant benefits.⁷ Rather, the role of the court, among other duties, is to conduct a review of the record to ascertain whether any error has been committed by the Board.⁸

Under the "clearly erroneous" standard, the court can overturn the Board of Veterans Appeals only when there is no plausible basis in the record for the decision.⁹ The court is not permitted to substitute its judgment for that of the Board on issues of material fact; if there is a "plausible" basis in the record for the factual determinations of the Board, the court cannot overturn them.¹⁰ In making such determinations, the court must take due account of the rule of prejudicial error.¹¹ This means that the court is required to apply the same kind of harmless-error rule that courts ordinarily apply in civil cases.¹²

Findings of fact made by the Secretary or the Board of Veterans Appeals are not subject to trial de novo by the court.¹³ It is the responsibility of the Board,¹⁴ not the Court of Appeals for Veterans Claims,¹⁵ to assess the credibility and weight to be given to evidence. Thus, when a final decision of the Board of Veterans Appeals is adverse to a party and the sole stated basis for such decision is the failure of the party to comply with any applicable regulation prescribed by the Secretary, the court may review

only questions raised as to compliance with and the validity of the regulation.¹⁶ The court also may not review the merits of a veteran's contention of entitlement to equitable relief from the Secretary of Veterans Affairs.¹⁷

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Footnotes

- 1 § 184.
- 2 38 U.S.C.A. § 7252(b).
- 3 Winslow v. Brown, 8 Vet. App. 469 (1996).
- 4 38 U.S.C.A. § 7252(b).
- 5 38 U.S.C.A. § 1155.
- 6 38 U.S.C.A. § 7252(b).
- 7 Schroeder v. Brown, 6 Vet. App. 220 (1994).
- 8 Schroeder v. Brown, 6 Vet. App. 220 (1994).
- 9 Cathell v. Brown, 8 Vet. App. 539 (1996).
- 10 Manibog v. Brown, 8 Vet. App. 465 (1996).
- 11 38 U.S.C.A. § 7261(b)(2).
- 12 Shinseki v. Sanders, 556 U.S. 396, 129 S. Ct. 1696, 173 L. Ed. 2d 532 (2009).
- 13 38 U.S.C.A. § 7261(c).
- 14 § 180.
- 15 Owens v. Brown, 7 Vet. App. 429 (1995).
- 16 38 U.S.C.A. § 7261(d).
- 17 Harvey v. Brown, 6 Vet. App. 416, 91 Ed. Law Rep. 994 (1994).
As to the power of the Secretary to provide equitable relief with regard to veterans' benefits' claims, generally, see § 16.

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B. Appeal and Review

3. United States Court of Appeals for Veterans Claims

§ 188. Scope and standard of review—Clear and unmistakable error

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West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  [134.5](#), [155](#), [165](#), [166](#)

Treatises and Practice Aids

Review of findings of fact under "clearly erroneous" standard, Federal Procedure, L. Ed., Veterans and Veterans Affairs[[Westlaw®\(r\): Search Query](#)]

Determination as to clear and unmistakable error, Federal Procedure, L. Ed., Veterans and Veterans Affairs[[Westlaw®\(r\): Search Query](#)]

By federal regulation, in the Court of Appeals for Veterans Claims, previous determinations which are final and binding, including decisions of service connection, degree of disability, age, marriage, relationship, service, dependency, line of duty, and other issues will be accepted as correct in the absence of clear and unmistakable error.¹ Where evidence establishes such error, the prior decision will be reversed or amended.² For a determination that clear and unmistakable error exist: (1) either the correct facts, as they were known at the time, must not have been before the adjudicator or the statutory or regulatory provisions extant at the time must have been incorrectly applied; (2) the error must be "undebatable" and of the sort which, had it not been made, would have manifestly changed the outcome at the time it was made; and (3) the determination must be based on the record and law that existed at the time of the prior adjudication in question.³ Otherwise, final decisions of the Board of Veterans Appeals are not subject to collateral review for "clear and unmistakable error" under the applicable regulation⁴ since the review authority in the regulation relates only to review of adjudicatory decisions of agencies of original jurisdiction, not those of the Board.⁵

Practice Tip:

A veteran may not simply allege clear and unmistakable error on the basis that prior adjudications improperly weighed and evaluated evidence. Such a claim must be specific and not a mere broad allegation of failure to follow regulations, or failure to give due process, or any other general error.⁶

CUMULATIVE SUPPLEMENT

Statutes:

[38 C.F.R. § 3.105\(a\)](#), as revised effective February 19, 2019, provides that decisions are final when the underlying claim is finally adjudicated. Final decisions will be accepted by the Department of Veterans Affairs (VA) as correct with respect to the evidentiary record and the law that existed at the time of the decision, in the absence of clear and unmistakable error. At any time after a decision is final, the claimant may request, or the VA may initiate, review of the decision to determine if there was a clear and unmistakable error in the decision. Where the evidence establishes such error, the prior decision will be reversed or amended. A clear and unmistakable error is a very specific and rare kind of error. It is the kind of error, of fact or of law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error. If it is not absolutely clear that a different result would have ensued, the error complained of cannot be clear and unmistakable.

[END OF SUPPLEMENT]

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Footnotes

- 1 [38 C.F.R. § 3.105\(a\)](#).
A claim of clear and unmistakable error is a collateral attack on a final Veterans Affairs regional office decision. [Wamhoff v. Brown](#), 8 Vet. App. 517 (1996).
- 2 [38 C.F.R. § 3.105\(a\)](#).
- 3 [Wamhoff v. Brown](#), 8 Vet. App. 517 (1996).
A "clear and unmistakable error" under the regulation must be the sort of error which, had it not been made, would have manifestly changed the outcome at the time it was made; thus, a regional office's mistake in listing a veteran's service connected hearing loss as having been incurred, rather than as having been aggravated, in World War II being merely a clerical error, could have no effect on the appellant's award of benefits and could not be clear and unmistakable error. [Winslow v. Brown](#), 8 Vet. App. 469 (1996).
The decision of a Department of Veterans Affairs (VA) regional office (RO), concluding that the circumstances of a service member's discharge precluded his consideration for any VA benefit and advising him to seek a character of discharge upgrade from the Army Board for Correction of Military Records, was not based on clear and unmistakable error, even though the RO's conclusion was not thoroughly explained, since further elaboration by the RO was not required under the law extant at the time of the RO's decision,

and a manifestly different outcome would not have resulted even if the RO's decision had failed to make the character of discharge determination. [Robertson v. Shinseki](#), 26 Vet. App. 169 (2013), decision aff'd, 759 F.3d 1351 (Fed. Cir. 2014), cert. denied, 135 S. Ct. 1716, 191 L. Ed. 2d 678 (2015).

4 38 C.F.R. § 3.105(a).

5 [Smith v. Brown](#), 35 F.3d 1516 (Fed. Cir. 1994).

6 [Mindenhall v. Brown](#), 7 Vet. App. 271 (1994), dismissed, 53 F.3d 347 (Fed. Cir. 1995).

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B. Appeal and Review

3. United States Court of Appeals for Veterans Claims

§ 189. Making, issuance, and publication of decisions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  166, 167

Treatises and Practice Aids

Decision and mandate, generally, Federal Procedure, L. Ed., Veterans and Veterans Affairs [\[Westlaw®\(r\): Search Query\]](#)

A judge or panel must make a determination upon any proceeding before the court and any motion in connection with such a proceeding that is assigned to the judge or panel.¹ The judge or panel is required to make a report of any such determination which constitutes the judge's or panel's final disposition of the proceeding.² The court is required to designate in its decision in any case those specific records of the federal government on which it relied (if any) in making its decision.³

A decision upon a proceeding before the Court of Appeals for Veterans Claims must be made as quickly as practicable.⁴ In a case heard by a panel of the court, the decision must be made by a majority vote of the panel in accordance with the rules of the court.⁵ The decision of the judge or panel hearing the case so made is the decision of the court.⁶

Specific provision is made with regard to publication of decisions.⁷

Footnotes

- 1 38 U.S.C.A. § 7267(b).
- 2 38 U.S.C.A. § 7267(b).
- 3 38 U.S.C.A. § 7267(c).
- 4 38 U.S.C.A. § 7267(a).
- 5 38 U.S.C.A. § 7267(a).
- 6 38 U.S.C.A. § 7267(a).
- 7 38 U.S.C.A. § 7269.

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3. United States Court of Appeals for Veterans Claims

§ 190. Date when decision becomes final

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West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  166, 167

A decision of the Court of Appeals for Veterans Claims will become final upon the expiration of the time allowed for filing a notice of appeal from such decision if no such notice is duly filed within such time.¹ If such a notice is filed within the required time, such a decision will become final: (1) upon the expiration of the time allowed for filing a petition for certiorari with the Supreme Court of the United States, if the decision of the Court of Appeals for Veterans Claims is affirmed or the appeal is dismissed by the United States Court of Appeals for the Federal Circuit and no petition for certiorari is duly filed;² (2) upon the denial of a petition for certiorari, if the decision of the Court of Appeals for Veterans Claims is affirmed or the appeal is dismissed by the United States Court of Appeals for the Federal Circuit;³ or (3) upon the expiration of 30 days from the date of issuance of the mandate of the supreme court, if that court directs that the decision of the Court of Appeals for Veterans Claims be affirmed or the appeal dismissed.⁴

If the supreme court directs that the decision of the Court of Appeals for Veterans Claims be modified or reversed, the decision of the Court of Veterans Appeals rendered in accordance with the mandate of the supreme court will become final upon the expiration of 30 days from the time it was rendered unless within such 30 days, either the Secretary or the petitioner has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the Court of Appeals for Veterans Claims will become final when so corrected.⁵

If: (1) the decision of the Court of Appeals for Veterans Claims is modified or reversed by the United States Court of Appeals for the Federal Circuit; and (2) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed,⁶ the petition for certiorari has been denied,⁷ or the decision of the United States Court of Appeals for the Federal Circuit has been affirmed by the supreme court,⁸ then the decision of the Court of Appeals for Veterans Claims rendered in accordance

with the mandate of the United States Court of Appeals for the Federal Circuit will become final upon the expiration of 30 days from the time such decision of the Court of Appeals for Veterans Claims was rendered unless within such 30 days, either the Secretary or the petitioner has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Court of Appeals for Veterans Claims will become final when so corrected.⁹ Similarly, where: (1) the supreme court orders a rehearing, or if the case is remanded by the United States Court of Appeals for the Federal Circuit to the Court of Appeals for Veterans Claims for a rehearing;¹⁰ and (2) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed,¹¹ the petition for certiorari has been denied,¹² or the decision of the United States Court of Appeals for the Federal Circuit has been affirmed by the supreme court,¹³ then the decision of the Court of Appeals for Veterans Claims rendered upon such rehearing will become final in the same manner as though no prior decision of the Court of Appeals for Veterans Claims had been rendered.¹⁴

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Footnotes

- 1 38 U.S.C.A. § 7291(a).
- 2 38 U.S.C.A. § 7291(a)(1).
A judgment of the Court of Appeals for Veterans Claims becomes final, for purposes of the 30-day period in which to file an application for attorney's fees and expenses under the EAJA, upon the expiration of the 90-day period for filing a petition for certiorari from the judgment of the Federal Circuit, not when the Federal Circuit dismisses the veteran's appeal based on the veteran's unopposed motion to withdraw the appeal, see § 191.
- 3 38 U.S.C.A. § 7291(a)(2).
- 4 38 U.S.C.A. § 7291(a)(3).
- 5 38 U.S.C.A. § 7291(b)(1).
- 6 38 U.S.C.A. § 7291(b)(2)(A).
- 7 38 U.S.C.A. § 7291(b)(2)(B).
- 8 38 U.S.C.A. § 7291(b)(2)(C).
- 9 38 U.S.C.A. § 7291(b)(2).
- 10 38 U.S.C.A. § 7291(c).
- 11 38 U.S.C.A. § 7291(c)(1).
- 12 38 U.S.C.A. § 7291(c)(2).
- 13 38 U.S.C.A. § 7291(c)(3).
- 14 38 U.S.C.A. § 7291(c).

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§ 191. Award of attorney's fees

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West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  164, 166

Prevailing party status for purposes of an award of attorney's fees under the Equal Access to Justice Act (EAJA) in the Court of Appeals for Veterans Claims arises either through a court direction that the Secretary of Veterans Affairs award the benefits sought to the claimant or through the grant of a merits-stage court remand predicated on administrative error.¹ For prevailing party status predicated on a remand for administrative error, the remand must either have been directed in a court opinion, decision, or order that contained a court recognition of administrative error or have been granted on the basis of a concession of error by the Secretary.²

A judgment of the Court of Appeals for Veterans Claims becomes final, for purposes of the 30-day period in which to file an application for attorney's fees and expenses under the EAJA, upon the expiration of the 90-day period for filing a petition for certiorari from the judgment of the Federal Circuit, not when the Federal Circuit dismisses the veteran's appeal based on the veteran's unopposed motion to withdraw the appeal.³

An appellant before the Court of Appeals for Veterans Claims may receive an award of attorney's fees and expenses under the EAJA for presuspension work performed by an attorney who is subsequently suspended from practice before the court.⁴

Observation:

Provision is specifically made by statute with regard to fee agreements with representatives and review thereof by the court.⁵

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Footnotes

- 1 [Gurley v. Nicholson, 20 Vet. App. 573 \(2007\)](#), decision aff'd, [528 F.3d 1322 \(Fed. Cir. 2008\)](#).
- 2 [Gurley v. Nicholson, 20 Vet. App. 573 \(2007\)](#), decision aff'd, [528 F.3d 1322 \(Fed. Cir. 2008\)](#).
A remand by the Court of Appeals for Veterans Claims based on a joint motion of the parties in which the Secretary of Veterans Affairs conceded that the Board of Veterans Appeals committed error in its decision on the merits of veteran's service connection claim was a remand predicated on administrative error, conferring "prevailing party" status on the veteran for purposes of an award of attorney's fees and expenses under the EAJA. [Zuberi v. Nicholson, 19 Vet. App. 541 \(2006\)](#).
- 3 [Kidney v. Shinseki, 22 Vet. App. 367 \(2009\)](#).
For a general discussion of the 30-day period, see [Am. Jur. 2d, Federal Courts § 234](#).
As to finality of decision of Court of Appeals for Veterans Claims, generally, see [§ 190](#).
- 4 [Molden v. Peake, 22 Vet. App. 177 \(2008\)](#).
- 5 [§ 186](#).

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3. United States Court of Appeals for Veterans Claims

§ 192. Service of pleading, decision, order, or process

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West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  162, 166

The mailing of a pleading, decision, order, notice, or process in respect of proceedings before the United States Court of Appeals for Veterans Claims will be held sufficient service of such pleading, decision, order, notice, or process if it is properly addressed to the address furnished by the appellant on the notice of appeal.¹

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Footnotes

¹ [38 U.S.C.A. § 7264\(b\)](#).

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3. United States Court of Appeals for Veterans Claims

§ 193. Availability for public inspection of decisions, court documents, and exhibits

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West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  [160](#), [162](#), [165](#)

With statutorily specified exception,¹ all decisions of the Court of Appeals for Veterans Claims and all briefs, motions, documents, and exhibits received by the court, including a transcript of the stenographic report of the hearings, are public records open to the inspection of the public.²

A fee may be fixed by the Court of Appeals for Veterans Claims for comparing, or for preparing and comparing, a transcript of the record of any proceeding before the court or for copying any record, entry, or other paper and the comparison and certification thereof.³

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Footnotes

- [1](#) [38 U.S.C.A. § 7268\(b\).](#)
- [2](#) [38 U.S.C.A. § 7268\(a\).](#)
- [3](#) [38 U.S.C.A. § 7284.](#)

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4. United States Court of Appeals for Federal Circuit

§ 194. Jurisdiction and availability of review, generally

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West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  168, 169

Treatises and Practice Aids

Right to review; governing rules, Federal Procedure, L. Ed., Veterans and Veterans Affairs [\[Westlaw®\(r\): Search Query\]](#)

Congress has given the Federal Circuit Court limited jurisdiction over appeals from the Court of Appeals for Veterans Claims.¹ Specifically, after a decision of the United States Court of Appeals for Veterans Claims is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of a decision of the court on a rule of law or of any statute or regulation (other than a refusal to review the schedule of ratings for disabilities adopted under a specific provision)² or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the court in making the decision.³

The Court of Appeals for the Federal Circuit lacks jurisdiction to review the Court of Appeals for Veterans Claims' dismissal of a surviving spouse's claim as untimely where the appellant challenges a factual determination of the timeliness of the notice of appeal.⁴ The Federal Circuit Court of Appeals also lacks jurisdiction to review a veteran's challenge to a denial by the Court of Appeals for Veterans Claims of a full court review of a single-judge decision.⁵

Practice Tip:

Review of a decision of the Court of Appeals for Veterans Claims is to be obtained by filing a notice of appeal with such court within the time and in the manner prescribed for appeals to United States courts of appeal from United States district courts.⁶ Generally, a party seeking to stay the effect of one of the decisions of the Court of Appeals for Veterans Claims pending appeal must file a motion to stay in the case the effect of which the party wishes to stay.⁷

When a judge or panel of the Court of Appeals for Veterans Claims, in making an order not otherwise appealable, determines that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that there is in fact a disagreement between the appellant and the Secretary of Veterans Affairs with respect to that question of law, and that the ultimate termination of the case may be materially advanced by the immediate consideration of that question, the judge or panel must notify the chief judge of that determination.⁸

The United States Court of Appeals for the Federal Circuit has exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof, and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision.⁹ The judgment of such court will be final subject to review by the supreme court upon certiorari.¹⁰

Observation:

The court of appeals had jurisdiction to hear a veteran's void-for-vagueness challenge to a schedule of ratings for liver disabilities amended by the Department of Veterans Affairs, even though the governing statute excepted actions relating to the schedule of ratings from its jurisdictional grant, inasmuch as the statute did not expressly exclude constitutional challenges, and the presence of provisions allowing for review of constitutional challenges in related statutes was insufficient to establish clear and convincing evidence of congressional intent to foreclose such challenges under the governing statute.¹¹

CUMULATIVE SUPPLEMENT

Cases:

Court of Appeals for the Federal Circuit would decline to consider claimant's argument, raised for the first time on appeal of the denial of his claim for a one-time payment from the Filipino Veterans Equity Compensation Fund (compensation fund), that requiring service department verification to receive payment from the compensation fund violated the Equal Protection

Component of the Due Process Clause; argument was not raised at any point in the proceedings below. [U.S. Const. Amend. 5](#); American Recovery and Reinvestment Act of 2009 (ARRA), [Pub. L. No. 111-5, 123 Stat. 115](#). [Dela Cruz v. Wilkie](#), 931 F.3d 1143 (Fed. Cir. 2019).

The statute granting the United States Court of Appeals for the Federal Circuit jurisdiction to review decisions by the United States Court of Appeals for Veterans Claims affirming decisions by the Board of Veterans' Appeals authorizes the Federal Circuit to determine whether a decision by the Court of Appeals for Veterans Claims may have rested on an incorrect rule of law and, moreover, to determine that the correct rule of law requires factual determinations missing from the Board's decision, and perhaps further factual development, thus precluding affirmance of the Board's decision by the Court of Appeals for Veterans Claims. [38 U.S.C.A. § 7292](#). [Acree v. O'Rourke](#), 891 F.3d 1009 (Fed. Cir. 2018).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Stillwell v. Brown](#), 46 F.3d 1111 (Fed. Cir. 1995).
- 2 [38 U.S.C.A. § 1155](#).
- 3 [38 U.S.C.A. § 7292\(a\)](#).
- 4 [Albun v. Brown](#), 9 F.3d 1528 (Fed. Cir. 1993).
- 5 [Arnesen v. Principi](#), 300 F.3d 1353 (Fed. Cir. 2002).
- 6 [38 U.S.C.A. § 7292\(a\)](#).
- 7 [Ribaud v. Nicholson](#), 21 Vet. App. 137 (2007).
- 8 [38 U.S.C.A. § 7292\(b\)\(1\)](#).
- 9 [38 U.S.C.A. § 7292\(c\)](#).
- 10 [38 U.S.C.A. § 7292\(c\)](#).
- 11 [Nyeholt v. Secretary Of Veterans Affairs](#), 298 F.3d 1350 (Fed. Cir. 2002).

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XIII. Claims for Veterans' Benefits; Decisions; Appeal and Review


B. Appeal and Review

4. United States Court of Appeals for Federal Circuit

§ 195. Reviewability of Merit Systems Protection Board decisions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  168, 169

Treatises and Practice Aids

Right to review; governing rules, Federal Procedure, L. Ed., Veterans and Veterans Affairs [\[Westlaw®\(r\): Search Query\]](#)

A person adversely affected or aggrieved by a final order or decision of the Federal Merit Systems Protection Board relating to the employment or reemployment of a veteran by a federal agency may petition the United States Court of Appeals for the Federal Circuit to review the final order or decision.¹

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Footnotes

¹ [38 U.S.C.A. § 4324\(d\)\(1\)](#).

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Treatises and Practice Aids

Standard of review of legal matters, Federal Procedure, L. Ed., Veterans and Veterans Affairs [\[Westlaw®\(r\): Search Query\]](#)

The Court of Appeals for the Federal Circuit must decide all relevant questions of law, including interpreting constitutional and statutory provisions.¹ De novo consideration is accorded by the court to such questions.² Thus, the Court of Appeals for the Federal Circuit affords no deference to a decision of the Court of Appeals for Veterans Claims on a rule of law or statute or regulation or legal interpretation thereof.³

The court must hold unlawful and set aside any regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the Court of Appeals for Veterans Claims that the Court of Appeals for the Federal Circuit finds to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;⁴ contrary to constitutional right, power, privilege, or immunity;⁵ in excess of statutory jurisdiction, authority, or limitations or in violation of a statutory right;⁶ or without observance of procedure required by law.⁷

Observation:

The Court of Appeals for the Federal Circuit has no power to contradict, under the guise of "interpretation," a valid regulation.⁸

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Footnotes

- 1 [38 U.S.C.A. § 7292\(d\)\(1\).](#)
- 2 [Stelzel v. Mansfield](#), 508 F.3d 1345 (Fed. Cir. 2007); [Jones v. Brown](#), 41 F.3d 634 (Fed. Cir. 1994).
- 3 [Gardin v. Shinseki](#), 613 F.3d 1374 (Fed. Cir. 2010).
- 4 [38 U.S.C.A. § 7292\(d\)\(1\)\(A\).](#)
- 5 [38 U.S.C.A. § 7292\(d\)\(1\)\(B\).](#)
The Veterans Court did not rely upon an interpretation of a regulation or statutory provisions that was "contrary to constitutional right, power, privilege, or immunity" by finding that two medical opinions were adequate to deny a veteran's claim for total disability based on individual unemployability, and thus, the court of appeals did not have jurisdiction on a petition for judicial review to address the adequacy of medical evaluations on due process grounds since the Veterans Court did not interpret the regulation or statute to permit reliance on inadequate medical opinions; furthermore, the veteran did not raise a "free-standing" constitutional claim below on the basis of the inadequacy of medical evaluations. [Geib v. Shinseki](#), 733 F.3d 1350 (Fed. Cir. 2013).
- 6 [38 U.S.C.A. § 7292\(d\)\(1\)\(C\).](#)
- 7 [38 U.S.C.A. § 7292\(d\)\(1\)\(D\).](#)
- 8 [Smith v. Brown](#), 35 F.3d 1516 (Fed. Cir. 1994).

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77 Am. Jur. 2d Veterans and Veterans Laws § 197

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Veterans and Veterans' Laws

Karl Oakes, J.D.

XIII. Claims for Veterans' Benefits; Decisions; Appeal and Review


B. Appeal and Review

4. United States Court of Appeals for Federal Circuit

§ 197. Review of factual determinations and of applications of law to particular facts

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Except to the extent that an appeal presents a constitutional issue, the court of appeals may not review a challenge to a factual determination,¹ such as—

- a finding as to when a disability was claimed or service connection established.²
- a finding as to whether a veteran filed a timely notice of disagreement following the Department of Veterans Affairs' denial of service connection for the veteran's hypertension.³
- a finding as to whether a particular diagnosis proved a compensable present disability at the time of a prior claim for benefits.⁴
- a determination of the Court of Appeals for Veterans Claims that a finding of the Board of Veterans Appeals that a veteran's current multiple joint pain was not related to the veteran's in-service multiple joint injuries or pain.⁵

Similarly, the court may not review a challenge to a law or regulation as applied to the facts of a particular case.⁶ Although a veteran's appeal raises questions arguably within the appellate court's jurisdiction, where those questions presume and depend upon a purported factual determination made in an administrative assessment of the veteran's claim, and where whether an alleged factual determination is made is itself a question of fact, it is beyond the court's jurisdiction to review.⁷

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Footnotes

- 1 38 U.S.C.A. § 7292(d)(2)(A).
A claim by a surviving spouse of a veteran that the Court of Appeals for Veterans Claims had improperly
rejected her argument that a pulmonary specialist failed to comply with a remand order of the Board of
Veterans Appeals in connection with her claim for dependency and indemnity compensation was in essence
a challenge to the decision of the Court of Appeals for Veterans Claims on a factual matter as to which
the Court of Appeals for the Federal Circuit did not have jurisdiction. [Dyment v. Principi](#), 287 F.3d 1377
(Fed. Cir. 2002).
- 2 [Young v. McDonald](#), 766 F.3d 1348 (Fed. Cir. 2014).
3 [Schellinger v. McDonald](#), 627 Fed. Appx. 918 (Fed. Cir. 2015).
4 [Conley v. Peake](#), 543 F.3d 1301 (Fed. Cir. 2008).
5 [Dye v. Mansfield](#), 504 F.3d 1289 (Fed. Cir. 2007).
6 38 U.S.C.A. § 7292(d)(2)(B).
The court of appeals could review only a facial challenge to a Department of Veterans Affairs (VA) regulation
brought by a county political party chairman, as review of VA rules and the manner in which those rules were
promulgated did not include the application of those rules to specific facts, while an as-applied challenge
would have required court of appeals to make such factual findings, a task it was not equipped to perform, the
chairman had contended that a VA regulation restricting demonstrations by visitors on VA property impeded
First Amendment free speech. [Preminger v. Secretary of Veterans Affairs](#), 517 F.3d 1299 (Fed. Cir. 2008).
The court of appeals had jurisdiction to review the Veterans Court's interpretation of statutory and regulatory
provisions pertaining to the types of evidence which may support a claim for benefits as the veteran was
not challenging the application of the law to the particular facts of the case or asking the appellate court to
reweigh the relevant facts. [Buchanan v. Nicholson](#), 451 F.3d 1331 (Fed. Cir. 2006).
7 [Futrell v. Brown](#), 45 F.3d 1534 (Fed. Cir. 1995).

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77 Am. Jur. 2d Veterans and Veterans Laws § 198

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Veterans and Veterans' Laws

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XIII. Claims for Veterans' Benefits; Decisions; Appeal and Review


B. Appeal and Review

4. United States Court of Appeals for Federal Circuit

§ 198. Disposition of appeal

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Upon review to the Court of Appeals for the Federal Circuit, the court has the power to affirm or, if the decision of the Court of Appeals for Veterans Claims is not in accordance with law, to modify or reverse the decision of the Court of Appeals for Veterans Claims or to remand the matter as appropriate.¹

CUMULATIVE SUPPLEMENT

Cases:

Veteran was not denied due process regarding his request for return of an overpayment, since veteran had been given several opportunities to challenge overpayment issue before the Veterans Administration (VA), the Board of Veterans' Appeals, and the United States Court of Appeals for Veterans Claims. [U.S. Const. Amend. 5](#). [Morris v. McDonald](#), 652 Fed. Appx. 963 (Fed. Cir. 2016).

[END OF SUPPLEMENT]

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Footnotes

¹ [38 U.S.C.A. § 7292\(e\)\(1\)](#).

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